

IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1959

No. ~~92~~ 102

ANDRA KOLJOVAT, DRAGO STOKIC, DRAGICA SUNJIC,  
 NEDA TURK, JOSIP BULGAN, JURE ZIVANOVIC,  
 MARA TOLIC and MILAN STOKIC, and also BRANKO  
 KARADZOLE, Consul General of Yugoslavia at  
 San Francisco, California, *Petitioners*

v.

STATE OF OREGON, acting by and through the  
 State Land Board

LUTVO ZEKIC, IBRO ZEKIC, HARIBA TURKOVIC, DZEDJA  
 PODOVAC, SEFKO MURADBASIC, DIKA MURADBASIC,  
 MERTA BRKIC, MILKA ZEKIC, JASMINA ZEKIC and  
 RAJKA ZEKIC, and BRANKO KARADZOLE, Consul  
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v.

STATE OF OREGON, acting by and through the  
 State Land Board

**PETITION FOR A WRIT OF CERTIORARI TO THE  
 SUPREME COURT OF THE STATE OF OREGON**

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The petitioners Andja Kolovrat, Drago Stojic,  
Dragica Sunjic, Neda Turk, Josip Bulgan, Jure  
Zivanovic, Mara Tolic, Milan Stojic and Lutvo Zekic,  
Ibro Zekic, Habiba Turkovic, Dzedja Popovac, Sefko

Muradbasic, Dika Muradbasic, Murta Brkic, Milka Zekic, Jasmina Zekic, Rajka Zekic and Branko Karadzole, Consul General of Yugoslavia at San Francisco, California, respondents in consolidated proceedings below, pray that a writ of certiorari issue to review the decrees of the Supreme Court of the State of Oregon therein.

### **OPINIONS BELOW**

The opinion of the Supreme Court of the State of Oregon is reported at 70 A. S. (Ore.) 55 and 349 P.2d 255, and is set out in App. A, pp. 1a-26a, *infra*. The Circuit Court of the State of Oregon for the County of Multnomah rendered no opinion.

### **JURISDICTION**

The decrees of the Supreme Court of the State of Oregon, reversing orders of the Circuit Court of the State of Oregon for the County of Multnomah, are dated and were entered January 13, 1960. The petitioners' timely petition for rehearing, filed February 26, 1960, was denied by order dated and entered March 1, 1960. The order and decrees of the Supreme Court of Oregon are set out in App. B, pp. 27a-32a, *infra*. The orders of the Circuit Court of Oregon are set out in App. C, pp. 33a-38a, *infra*. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. Sec. 1257(3).

### **QUESTIONS PRESENTED**

1. Whether under Article II of the Convention for Facilitating and Developing Commercial Relations of 1881, in force and effect between the United States and Yugoslavia, 22 Stat. 963, the citizens of both countries to whom there is thereby granted the right, among others enjoyed by citizens of the most favored

nation, to acquire by inheritance, or otherwise, property located within the territory of the other include citizens of one country who are not within the territory of the other.

2. Whether notwithstanding the adherence of both the United States and Yugoslavia to the Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, a State of the United States may deprive citizens and residents of Yugoslavia of the capacity to inherit property in such State solely by reason of the existence in Yugoslavia of foreign exchange controls, imposed or maintained consistently with such Agreement, pursuant to a State law making the right of an alien residing in a foreign country to take by will or by intestacy dependent upon "the rights of citizens of the United States \* \* \* money originating from estates of persons dying within such foreign country \* \* \*".

### TREATIES AND STATUTES INVOLVED

The treaty provisions involved are those of Article II of the Convention for Facilitating and Developing Commercial Relations (sometimes called the Convention of Commerce and Navigation) concluded between the United States and Serbia on October 2/14, 1881, 22 Stat. 963; Tr. Ser. 319, App. D, pp. 39a-42a, *infra*.<sup>1</sup>

<sup>1</sup> Hereinafter sometimes called "the Convention". That treaties concluded between the United States and Serbia continued in force and effect between the United States and Yugoslavia upon the latter's emergence from the union with Serbia of Montenegro and territories of the former Austro-Hungarian Monarchy, was the conclusion reached in *Ivancevic v. Artukovic*, 211 F. 2d 565 (9th Cir. 1954), cert. denied 348 U.S. 818, in which the United States participated as *amicus* in support of that view. That the Convention was in force and effect between the United States and Yugoslavia was not questioned below. R 633, 634.

Also involved are the provisions of Article VI, Section 3, Article VIII, Section 2, Article XIV, Sections 2 and 4, and Article XV, Section 2 of the Articles of Agreement of the International Monetary Fund, concluded on December 27, 1945, 60 Stat. 1401, T.I.A.S. 1501, to which the United States and Yugoslavia are signatories.<sup>2</sup> These provisions are set out in App. E, pp. 43a-47a, *infra*. The statutory provisions involved are those of Section 111.070, Oregon Revised Statutes, which is set out in App. F, p. 48a, *infra*.

### STATEMENT

Joe Stoich and Muharem Zekich died intestate in Oregon in December 1953. The petitioners, citizens and residents of Yugoslavia, are, except the Consul General of Yugoslavia, their respective brothers, sisters, nephews and nieces and their only heirs and next-of-kin. The State of Oregon filed petitions in the Circuit Court of Oregon for the escheat of the estates of both decedents upon the ground that as citizens and residents of Yugoslavia, the petitioners were without capacity to inherit property in Oregon by virtue of Section 111.070 of the Oregon Revised Statutes, App. F, p. 48a, *infra*, for the reason that the requirements thereof were not met by Yugoslavia. The petitions were opposed, and the proceedings were consolidated for trial.<sup>3</sup> R 6, 17, 623. The Circuit Court found against the State, dismissed its petitions for escheat, and ordered that distribution of both

<sup>2</sup> Hereinafter sometimes called "the International Monetary Fund Agreement", or "the Agreement".

<sup>3</sup> Originally, the estate of one Berosh was also involved. However, the petition for the escheat of his estate was dismissed early in the proceedings when it appeared that his survivors included a brother who was a citizen and resident of Australia. R 622, 623.

estates be made to the decedents' heirs and next-of-kin, the petitioners here. App. C, pp. 33a-38a, *infra*. Upon the State's consolidated appeals, the Supreme Court of Oregon reversed, and ordered both estates escheated. App. A, pp. 1a-26a, *infra*; App. B, pp. 27a-32a, *infra*.

The petitioners opposed the escheat of the estates on three grounds: *First*, that the petitioners were not barred from inheriting under the Oregon statute, App. F, p. 48a, *infra*, because all the requirements of the statute were in fact met by Yugoslavia, and in support of this contention, both oral and documentary evidence was introduced at the trial (R 43-185); *Second*, that the Oregon statute was inapplicable to citizens of Yugoslavia, because citizens of that country are entitled to the same rights of inheritance in the United States as American citizens by virtue of Article II of the Convention, App. D, pp. 39a-40a, *infra*, which grants to Yugoslav citizens the same rights to acquire property in the United States, by inheritance or otherwise, as are enjoyed by citizens of the most favored nation, and the United States has by treaty granted to citizens of other nations the right to inherit property in the United States under the same terms and conditions as citizens of the United States;<sup>4</sup>

<sup>4</sup> See, e.g., Article IX of the Treaty of Friendship, Commerce and Navigation concluded between the United States and Argentina, July 27, 1853, 10 Stat. 1005, Tr. Ser. 4, 1 Malloy, *Treaties*, 20, 23, which provides in pertinent part:

In whatever relates to \* \* \* the acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament or in any other manner whatsoever \* \* \* the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights as native citizens \* \* \*

As to the applicability of this provision to Yugoslav citizens entitled to the rights granted by Article II of the Convention (which was not questioned below) see App. G, pp. 51a, 56a, 57a, *infra*.

and *Third*, that by reason of the adherence of both the United States and Yugoslavia to the International Monetary Fund Agreement, App. E, pp. 43a-47a, *infra*, the maintenance by Yugoslavia of foreign exchange controls, consistent with such Agreement, could not in any event, be considered as a failure to meet the requirement of paragraph (b) of the Oregon statute, App. F, p. 48a, *infra*. Copies of the Convention and of the International Monetary Fund Agreement were offered by the petitioners, and received in evidence at the trial on the issues raised by the denials of their answers to the allegations of the State's petitions for escheat. R 6, 17, 55, 56, 90, 91, 279, 286. The cases were submitted to the Circuit Court after oral argument by counsel (unreported) at the conclusion of the taking of evidence. R 178, 184.

The Circuit Court rested its decision entirely on its findings that Yugoslavia in fact met all the requirements of the Oregon statute, as its orders refer to neither the Convention nor the International Monetary Fund Agreement. App. C, pp. 33a-38a, *infra*. Nevertheless, in its opening brief as appellant in the Oregon Supreme Court, the State said, R 633:

Much reliance is placed by the claimants [i.e., the petitioners here] upon the Treaty of Commerce of 1881 between the United States and Serbia, 22 Stat. 963 (Cl. Ex. 9) to which Yugoslavia is now the successor government \* \* \*

That the State made no mention in its opening brief to the Oregon Supreme Court of the International Monetary Fund Agreement, must be considered in the light of the State's failure to refer to it in its reply brief as well, notwithstanding the reliance put on it by the petitioners in the intervening brief that they

filed as respondents in the Oregon Supreme Court.  
R 735-738, 785-808.

On appeal, the Oregon Supreme Court held that the petitioners, not being in the United States, had no rights under Article II of the Convention, and, further, that notwithstanding the adherence of both the United States and Yugoslavia to the International Monetary Fund Agreement, the existence in Yugoslavia of foreign exchange controls prevented Yugoslavia from meeting the second of the requirements of the Oregon statute, without regard to whether such controls were maintained consistently with the Agreement, and on these grounds reversed the Circuit Court. 349 P.2d 255; App. A, pp. 1a-26a, *infra*.

While recognizing that rights of inheritance granted by treaty necessarily override inconsistent State laws, the Court below construed the provisions of Article II of the Convention as being applicable only to Yugoslav citizens who are within the United States, and, by necessary implication, only to American citizens who are within Yugoslavia. 349 P.2d at 263, 266; App. A, pp. 20a, 21a, *infra*. The Court below so construed Article II of the Convention notwithstanding Yugoslavia's construction of it, formally concurred in by the Department of State, as applying to *all* citizens of the United States regardless of their whereabouts, and the Department of State's parallel construction, with which Yugoslavia agrees, that it applies to *all* citizens of Yugoslavia wherever they might be. App. G, pp. 49a-62a, *infra*; R 967-983. In relying on *Clark v. Allen*, 331 U.S. 503, 514-516 (1947), the Court below misread both the treaty provision there involved and what was there held. 349 P.2d at 265; App. A, pp. 18a, 19a, *infra*. See pp. 12-15, *infra*. Moreover, in

arriving at its construction of Article II, the Court below considered only the stilted language of the Convention and failed entirely to consider that the Convention has for its express purpose "facilitating and developing commercial relations", that the provisions of the Convention which are involved, deal not merely with inheritance, but treat in identical terms with *all acquisitions and disposals of property by whatever means*, and that a construction of the Convention that would necessarily exclude from its protection in these respects, American and Yugoslav merchants remaining at home but sending their buyers and salesmen to the other country to buy and sell goods, as the Convention expressly contemplates, would defeat its very purpose. Thus, after quoting from *Clark*, 331 U.S. at 515-516, the Court below said, 349 P.2d at 266; App. A, p. 21a, *infra*:

If we correctly appraise the position of defendants, they would, notwithstanding the doctrine of *Clark v. Allen*, *supra*, have us interpret the words "in Serbia" and "in the United States," as they appear in Article II of the Treaty of 1881, as referring to the place where property rights are granted rather than to the geographical location of the person claiming them. If thus construed the provision would accord to the nationals of either party wherever resident rights similar to those enjoyed by nationals of the most favored nation wherever resident. But this we decline to do, being impressed that the construction given to the German Treaty in the *Clark* case applies with equal force to the Serbian Treaty of 1881.

\* \* \*

Having thus disposed of the Convention, the Court below turned to the Oregon statute under which the capacity to inherit of an alien non-resident of the

United States is made to depend upon the meeting of three conditions by the foreign country "of which such alien is an inhabitant or citizen". App. F, p. 48a, *infra*. The second of these conditions requires, in substance that American citizens have

\* \* \* rights \* \* \* to receive by payment to them within the United States \* \* \* money originating from \* \* \* estates \* \* \* within such foreign country \* \* \*

The Court below held that American citizens had no such "rights" in Yugoslavia because of the existence in that country of foreign exchange controls, and on that ground alone held the next-of-kin (the petitioners here) without capacity to inherit. 349 P.2d at 268; App. A, p. 26a, *infra*. In reaching this conclusion, the Court held as having "no bearing on our present problem", a provision of the Yugoslav foreign exchange law that the foreign exchange regulations include "the provisions of agreements with foreign countries which are concerned with payments", even though Article II of the Convention, as construed by Yugoslavia, provides that Americans anywhere are "at liberty to export freely the proceeds of the sale of their property, and their goods in general" (R 163-165, 169, 170, 286), that the Department of State is cognizant of no case in which an American distributee of a Yugoslav estate has failed to receive payment in the United States of his distributive share (R 766-769) and, as the Court itself said, that "The record is replete with evidence of remittances from estates in Yugoslavia to persons in the United States \* \* \*". 349 P.2d at 262; App. A, pp. 13a, 17a, *infra*. The position of the Court below was that under the Oregon statute it was immaterial whether such remittances

were *in fact* made, the statutory requirement being that Americans have legally enforceable rights to compel them, as to which the Court below found the evidence to be in "conflict". 349 P.2d at 258, 262; App. A, pp. 13a, 14a, *infra*.

The Court below rejected the contention that even if the Yugoslav foreign exchange controls, maintained or imposed consistently with the International Monetary Fund Agreement, were applicable to remittances to the United States of the distributive shares of American distributees of Yugoslav estates, the adherence of both the United States and Yugoslavia to such Agreement, precluded a State from stripping citizens and residents of Yugoslavia of their capacity to inherit solely because of the existence of such controls. The Court below said, 349 P.2d at 267, 268; App. A, pp. 23a-24a, *infra*:

The defendants \* \* \* point to \* \* \* Art XIV, § 4 and Art XI, § 2 [of the International Monetary Fund Agreement] which provide sanctions against any member nation which imposes foreign exchange restrictions contrary to the provisions of the agreement.

\* \* \* \* \*

Article VII, § 3(b) of the agreement is also to the same tenor in recognizing that some nations will find the need to "impose limitations on the freedom of exchange operations."

\* \* \* \* \*

The \* \* \* Agreement gives no support to the thesis of defendants and, to the contrary, is in a large sense an international recognition that some countries, rightly or wrongly, would impose strictures such as are exemplified by the foreign exchange laws of Yugoslavia and Bulgaria (see *State Land Board v. Rogers, supra*).

## REASONS FOR GRANTING THE WRIT

1. Whether the Yugoslav citizens to whom the United States has granted important private rights by Article II of the Convention include Yugoslav citizens who are within Yugoslavia, or only those who are within the United States, is a federal question of substance which has not been determined by this Court in the seventy-nine years that the Convention has been in force and effect. Nor is it governed by such cases as *Frederickson v. Louisiana*, 23 How. (U.S.) 445 (1860), *Petersen v. Iowa*, 245 U.S. 170 (1917), *Daus v. Brown*, 245 U.S. 176 (1917), *Skarderud v. Tar Commission*, 245 U.S. 633 (1917), or *Clark v. Allen*, 331 U.S. 503, 514-516 (1947). For, the treaty provisions with which they were concerned dealt only with rights pertaining to the *disposal* by citizens of one country of their property in the other, including its devolution on their fellow citizens, and this Court held that such a treaty gave citizens of the other country to it no rights pertaining to the inheritance by them of property in the United States of American decedents. Here, the treaty provision deals with "all that concerns the right of *acquiring*, or possessing or disposing of every kind of property, real or personal" in one country by the citizens of the other, and, more specifically, grants to citizens of each country the right "to *acquire* and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, *inheritance*, or in any other manner whatever \* \* \*".

The question here, unlike that in *Frederickson* and the cases following it, is not whether treaty provisions relating to the *devolution* of the American estates of foreigners on their fellow citizens, pertain also to the devolution on them of the American estates of American decedents, but, rather, whether the more

general treaty rights of Yugoslav citizens with respect to *acquiring* property in the United States, by any means, including inheritance, extend to Yugoslav citizens who are in Yugoslavia, as well as to Yugoslav citizens who are in the United States. There was no such question in *Frederickson*, *Peterson*, *Duus*, *Skarderud* or *Clark*, and it appears to have arisen heretofore only in *Arbulich's Estate*, 41 Cal. 2d 86, 257 P.2d 433 (1953), in which a petition for *certiorari* was denied, 346 U.S. 897, thus leaving the question undetermined by this Court.

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The provision of the German treaty with which this Court was concerned in *Clark* was that, 331 U.S. at 514:

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatever nationality, whether resident or non-resident, shall succeed to such personal property \* \* \*

This Court held only, that while such a provision gave a German the right to dispose of his American property by will to another German, and protected the latter in his succession to *such* property, it did not give a German any treaty right to inherit the American property of an American decedent. If not identical in language, the treaty provisions involved in *Frederickson v. Louisiana*, 23 How. (U.S.) 445; *Petersen v. Iowa*, 245 U. S. 170, *Duus v. Brown*, 245 U. S. 176, and *Skarderud v. Tax Commission*, 245 U. S. 633, relied on in *Clark*, were precisely of the same tenor, and this Court's conclusions as to their scope were the same as

in *Clark*. The controversy here, however, is of an entirely different cloth.

Article II of the Convention, from which this controversy stems, provides in pertinent part, App. D, pp. 37a, 38a, *infra*:

In all that concerns the right of acquiring or possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.

Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever \* \* \*.

They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general \* \* \*.

Unlike the treaty provisions dealt with in *Clark* and the cases it follows, the foregoing *affirmatively* grants to citizens of Serbia, i.e., Yugoslavia, the right of citizens of the most favored nation to acquire property in the United States by inheritance, *without regard to the citizenship of the decedent*. There is no question here, as in *Clark* and the others, whether the rights granted by the treaty include the right to inherit the American property of an American decedent, and no such question was raised or passed on below. Rather, the question here, is whether the citizens of Yugoslavia who are entitled to such right under the Convention, include citizens of Yugoslavia who are not within the United States, as well as those who are.

The resolution of this question depends on the construction properly to be put on the phrase "citizens of the United States in Serbia and Serbian subjects in the United States," and which is wholly unlike any language to be found in the treaties involved in *Clark* and the cases preceding it.

By a tour-de-force doing brutal violence to the German treaty with which *Clark* was concerned, the Court below attempted to assimilate the question here to that dealt with there. Thus, after quoting the provision of the German treaty set out above, p. 42, *supra*, it said, 349 P.2d at 265; App. A, pp. 18a, 19a, *infra*:

We are of the opinion that the following words and phrases found in the German Treaty of 1923: "Nationals of either High Contracting Party \* \* \* within the territories of the other" are of the same import and meaning as the words and phrases found in Article II of the Treaty of 1881; that is, "citizens of the United States in Serbia and Serbian subjects in the United States" \* \* \*." (Emphasis supplied.)

So might one, and with equal accuracy, quote scripture as teaching that "In the beginning \* \* \* there was light", or the Declaration of Independence as saying, "When in the course of human events, it becomes necessary for one people to dissolve \* \* \* the laws of nature \* \* \*."

Moreover, the Court below not only misread the German treaty involved in *Clark*, but it misread this Court's decision, too. For, immediately following the passage from its opinion last quoted above, it said, 349 P.2d at 265; App. A, p. 19a, *infra*:

In the *Clark* case, it was held that the language of Article IV of the German Treaty applied only to nationals of either party who were *within* the territory of the other.

Nothing of the sort was decided in *Clark*. The decision there was that the treaty applied only to the succession to the American property of German decedents, and did not apply to the succession by Germans to the American property of American decedents. No question was there involved and none was there decided, as to whether the German treaty made any distinction based upon the whereabouts of either the decedent or his heir. Nor was there any such question involved or decided in *Frederickson*, *Peterson*, *Duus* or *Skardrud*.

**2. The construction of Article II of the Convention by the Court below is not in accord with applicable decisions of this Court, and is directly contrary to the construction of both the Department of State and Yugoslavia that the citizens of each country entitled to the important private rights thereby granted, among them the right to acquire property in the territory of the other, by inheritance or otherwise, include all such citizens regardless of their whereabouts.** The Department of State and Yugoslavia are in accord that the proper construction of Article II is that "whatever right is accorded in this country to nationals of any third country, wherever resident, with respect to the acquisition \* \* \* of property (including the rights of inheritance \* \* \*), shall be accorded likewise in this country to Yugoslav nationals wherever resident and irrespective of the decedent's nationality". App. G, p. 51a, *infra*. The more limited view of the Court below as to the citizens of Yugoslavia entitled to rights of inheritance in the United States under Article II of the Convention, if permitted to stand, may well invite the taking of a similarly limited view as to the American citizens entitled in Yugoslavia to the important private rights granted by Article II of the Convention.

The conduct of foreign affairs, including the honoring of treaty obligations and the protection of American rights abroad, are grave matters of national concern, and the construction put upon a treaty by both the Department of State and the other party to it, should not be upset by a contrary construction of a State court. Whether a treaty of the United States is to be construed as the Executive Branch and the other country bound thereby construe it, or is otherwise to be construed, is a matter that should be determined by *this* Court. This is particularly so where, as here, the treaty grants, in identical terms, important private rights in each country to citizens of the other, and its proper construction necessarily involves considerations of more than mere local concern.

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As a matter of grammatical construction, the question is whether the words "in Serbia" and "in the United States" as used in the clause "citizens of the United States in Serbia and Serbian subjects in the United States", are descriptive, respectively, of the "citizens of the United States" and the "Serbian subjects" to whom Article II grants rights, or whether they are descriptive of the place where such citizens and subjects, respectively, have such rights. As a matter of syntax, the stilted language of this clause would seem susceptible of either construction, depending upon where the emphasis is put, either arbitrarily, or having in mind the context in which it is used, and the consequences of reading it one way or the other. The Court below gave no consideration either to context or consequences, and as in its exposition of *Clark* and the treaty provision there involved, it dealt only

with empty words, letting their substance and significance escape.

The Convention is expressly one for "facilitating and developing the commercial relations established between the two countries." App. D, p. 39a, *infra*. Article III expressly contemplates that there will be, App. D, p. 40a, *infra*,

Merchants, manufacturers, and trades people in general of one of the two contracting countries traveling in the other, or sending thither their clerks and agents \* \* \* for the purpose of making purchases or sales or receiving commissions \* \* \*.

It is, of course, in this context that Article II must be read. If, as the Court below has held, Article II *must* be construed as a grant of rights only to citizens of the United States who are in Yugoslavia, and only to Yugoslav citizens who are in the United States, then in large measure is its purpose frustrated. For, under such a construction, the property in one country of a merchant of the other, remaining at home and conducting his business through clerks or agents (or by mail or cable) would be wholly unprotected by Article II. There would be no assurance that his heirs living at home would succeed to it in the event of his death, and this lack of protection would extend to such property as credits with bankers and merchants resulting from sales, or established in anticipation of purchases, to goods bought but not yet exported, and goods warehoused pending sale or re-exportation. See, e.g. Articles III, and VII of the Convention, App. D, pp. 40a, 41a, *infra*. Nor would a merchant of one country so conducting his business with merchants in the other, have any assurance under Article II that he could, in the ordinary course of commercial

transactions, give or acquire title to, or even "possess" goods in the other, unless he were there, too.

In brief, if the construction of Article II of the Convention by the Court below has any validity merchants of both countries are left without those very guarantees concerning property rights that are so essential to the commercial relations that the Convention was designed to facilitate and develop. Of course, the Convention contemplated that some merchants of both countries would visit or dwell in the other; but it also contemplated, that others, necessarily the larger part, would not. And, certainly, it would seem unreasonable to suppose that the protection provided by Article II of the Convention was intended to protect merchants of one country only while dwelling or visiting in the other. But that is exactly what the construction of the Court below would do. This is not, of course, to say that Article II, in terms without limitation in that regard, is applicable only to merchants. *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920). But the effect of its application to merchants, construed in one way or the other, is a proper test of whether the construction is the right one.

It was expressly because of such considerations that the Secretary of State, in response to a formal inquiry from the Ambassador of Yugoslavia, confirmed in a note dated April 24, 1958, that, App. G, p. 51a, *infra*:

The Department of State concurs in the Yugoslav interpretation of Article II of the 1881 Convention. That is to say, it is the opinion of the Department that Article II provides that whatever right is accorded in this country to nationals of any third country, wherever resident, with respect to the acquisition, possession or dis-

position of property (including the rights of inheritance and transfer of proceeds thereof), shall be accorded likewise in this country to Yugoslav nationals wherever resident and irrespective of the decedent's nationality.

The complete text of the Secretary's note, and of the Yugoslav Ambassador's note of April 18, 1958, to which it is in reply, both well-considered expositions of Article II of the Convention, are set out in App. G, pp. 49a-62a, *infra*.<sup>5</sup>

This construction of the Convention is not new. Thus, ten years earlier, when in 1948 the United States agreed with Yugoslavia to a settlement of the claims of American citizens against Yugoslavia for the taking of American property in that country, one of the objectives was to secure assurances for the future. Accordingly, Article 5 of the Settlement Agreement provided, 62 Stat. 2658; T.I.A.S. 1803:

The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia, or

<sup>5</sup> This exchange of notes occurred while the State's appeal to the Court below was pending, and, indeed, after the petitioners, as respondents there, had filed their reply brief on March 28, 1958. Copies of the notes were, however, furnished to the Court below well before the case was argued on December 16, 1959. R 967-983. Certified copies of the notes have been lodged with the Clerk, and it is believed that they are "records \* \* \* which this Court is clearly authorized to consult \* \* \*." *The Paquete Habana*, 175 U.S. 677, 696 (1900); see, *Neilsen v. Johnson*, 279 U.S. 47, 52 (1929).

of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2-14, 1881.

The Congress considered this provision as obliging Yugoslavia "to continue to grant most-favored-nation treatment to Americans in ownership and acquisition of assets in Yugoslavia", S. Rep. No. 800, 81st Cong. 2d Sess. p. 4,<sup>6</sup> and it must be obvious that the United States would not have been content with a mere reference to the Convention if it had been considered that Article II, its property-rights provision, applied only to such few Americans as were, or were likely to be in Yugoslavia. But the decision of the Court below, if allowed to stand, may reduce the 1948 guarantee to just that, even though Yugoslavia, too, considered it as extending to all Americans, whether in Yugoslavia or not. App. G, pp. 58a, 59a, *infra*.

Moreover, the construction placed upon Article II by the Congress, the State Department and Yugoslavia is exactly that of its American negotiator, who, in commenting on it in an official report to the Department of

<sup>6</sup> This Report was made by the Senate Foreign Relations Committee in acting favorably on the bill that became the International Claims Settlement Act of 1949, 64 Stat. 12, Tit. 22 U.S.C. Sec. 1621, *et seq.*, under which the claims against Yugoslavia were adjudicated, and the proceeds of the settlement distributed.

State, transmitted March 29, 1883, said, App. I, pp. 70a, 71a *infra*, said:

"By Commercial and Consular treaties lately concluded, *citizens of the United States have in Serbia all the rights and privileges enjoyed by subjects of other nations.*"<sup>6a</sup> (Emphasis supplied.)

That the phrase in question is susceptible of two meanings cannot be gainsaid. Indeed, in the Convention itself, it is sometimes used in one sense, sometimes in the other, and in at least one provision, clearly in both. Thus, Article IV of the Convention in part provides, App. D, p. 40a, *infra*:

Citizens of the United States in Serbia and Serbian subjects in the United States shall be reciprocally exempted from all personal service, whether in the army by land or by sea; whether in the national guard or militia \* \* \*.

They shall have reciprocally free access to the courts of justice on conforming to the laws of the country, both for the prosecution and for the defense of their rights in all the degrees of jurisdiction established by the laws. \* \* \*

If the exemptions of the first paragraph can be said of necessity to apply only to citizens of one country who are within the other, it would nevertheless frus-

<sup>6a</sup> The existence of this report in the Archives of the United States was learned of by the petitioners only late in the course of the preparation of this petition. That it is not referred to by the Secretary of State in his note of April 24, 1958, App. G, pp. 49a-53a, *infra*, may indicate that its existence was not known to the Department of State at that time. The Consular treaty, 22 Stat. 968, Tr. Ser. 320, 2 Malloy, *Treaties*, 1618, was concluded simultaneously with the Convention. A certified copy of the entire report has been lodged with the Clerk and it is believed that this Court may properly consult it. See, fn. 5, p. 13, *supra*.

trate the clear purpose of the treaty, to say that the second paragraph does *not* guarantee Americans and Yugoslavs, regardless of where they might be, free access to the courts of Yugoslavia and the United States, respectively; and any such interpretation of it must necessarily be rejected. *DeGeofroy v. Riggs*, 133 U.S. 258 (1890).

Time and time again this Court has held that "the accepted canon" requires that a treaty be construed "liberally to give effect to the purpose which animates it" so that "even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred". *Barcardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *Shanks v. Dupont*, 3 Pet. (U.S.) 242, 249 (1830); *Haucenstein v. Lypham*, 100 U.S. 483, (1880); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Factor v. Laubenhimer*, 290 U.S. 276, 293, 294 (1933). With equal constancy, too, this Court has held that in construing a treaty, courts must "be careful to see that international engagements are faithfully kept and observed" and to that end, "the construction placed upon the treaty \* \* \* and consistently adhered to by the Executive Department of the government, charged with the supervision of our foreign relations, should be given much weight." *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Factor v. Laubenhimer*, *supra*, 290 U.S. at 295.

The Court below ignored both of these principles. It gave no weight to the construction placed upon the treaty by the Secretary of State, giving as its reason only that he acknowledged, correctly enough, that his

construction could not be considered "as effecting any modification of the treaty". 349 P. 2d at 268; App. A, p. 25a, *infra*; App. G, p. 53a, *infra*. It recognized that the pivotal clause was susceptible of two meanings, but it chose the limiting rather than the liberal construction, not because it found that the sense or purpose of the Convention compelled it, but because it misread out of all recognition both *Clark v. Allen*, *supra*, and the treaty there involved. It substituted asterisks for substance and then saw similarities where only vast differences were to be found. 349 P. 2d at 265, 266; App. A, p. 19a, *infra*; see, pp. 14, 15, *supra*. In short, the decision of the Court below is not in accord with the applicable decisions of this Court and it grossly misapplies one that is wholly inapplicable. Its construction of Article II is inconsistent with the express purpose of the Convention, and if allowed to stand, would frustrate it.

**3. The applicability to Yugoslav citizens who are not within the United States, of the laws of many States concerning the inheritance of property by alien non-residents of the United States, depends upon whether they are entitled to the rights granted by Article II of the Convention. In the absence of a determination of that question by this Court, there can be no assurance of uniformity in the application of the Convention by the State courts. The Yugoslav citizens who are entitled to the rights granted by Article II of the Convention, are entitled to such rights throughout the United States. But, in addition to Oregon, other States including California, Iowa, Louisiana, Montana, Nevada and Oklahoma have so-called "reciprocity" statutes under which, in substance, aliens not resident in the United States may not inherit property in such States unless**

the foreign countries in which they reside accord American citizens the "reciprocal" rights therein prescribed.<sup>7</sup> Other States including Connecticut and Texas have statutes dealing with the right to acquire and hold property which differentiate between resident and non-resident aliens.<sup>8</sup> Still other States including Massachusetts, New York, Pennsylvania, Ohio and Wisconsin have statutes under which the distributive shares of decedent estates payable to aliens living abroad are impounded, and not permitted to be transmitted to them, unless specified conditions in the foreign countries wherein they reside are shown to meet the requirements of such statutes.<sup>9</sup>

Regardless of their purpose or merit, if Article II of the Convention is applicable to citizens of Yugoslavia not within the United States, these statutes are not. *Clark v. Allen*, 331 U.S. 515, 517 (1947); *Hauenstein v. Lynham*, 100 U.S. 483 (1880). But, in the absence of a determination of the question by this Court, the existence of these statutes leaves the way open for conflicting constructions of the Convention by State courts.

<sup>7</sup> See, Cal. Probate Code, Sec. 259; Iowa Code, Sec. 567.8; Mont. Rev. Code, Sec. 91-520; Nev. Rev. Stat., Sec. 134.230; Okla. Stat., Sec. 60-121. Art. 1490, La. Rev. Civil Code, has apparently been held not to apply to "legal" heirs, whether taking by will or intestacy. *Succession of Herdman*, 154 La. 477, 97 So. 664 (1923).

<sup>8</sup> See, Conn. Gen. Stat., Secs. 47-57, 47-58, 17-269, 45-249; Tex. (Vern.) Stat., Secs. 177, 167-172.

<sup>9</sup> See, Mass. L., ch. 206, Sec. 27B; N.Y. Sur. Ct. Act, Sec. 269; Penna. (Purd.) Stat. Tit. 20, Secs. 115f, 320.737; Ohio (Page) Rev. Code, Sec. 2113.81; Wise. (West) Stat., Sec. 318-06. It should be noted in connection with these "impounding" statutes, that Article II of the Convention contains a provision concerning citizens of each country being "at liberty to export freely the proceeds of the sale of their property, and their goods in general" from the territory of the other. App. D, pp. 39a, 40a, *infra*.

and the consequent anomaly of a treaty of the United States concerning important private rights and uniformly applicable throughout the United States, being given different meanings in different States. Thus, in contrast to the decision of the Court below, a Louisiana court, only on May 9 last, held that "the Treaty of 1881 (Article II) should be interpreted to include the nationals of both countries wherever they reside \* \* \*". *Succession of Vlaho*, unreported, No. 366848, *Civil District Court for the Parish of Orleans*, App. II, pp. 67a, 68a, *infra*.

Moreover, so long as the question remains undetermined by this Court, the not inconsiderable delay and expense incident to showing by proof that the requirements of such State statutes have been met, made necessary by the doubt created by *Arbulich*, p. 12 *supra*, and now by the decision of the Court below, will continue seriously to burden cases of estates whose beneficiaries include Yugoslav citizens not within the United States, although grave doubts must necessarily persist as to the applicability of such statutes. See, e.g., *Spōya's Estate*, 129 Mon. 83, 282 P. 2d 452 (1955) and *Ginn's Estate*, — Mon. —, 347 P. 2d 467 (1959), where decisions in favor of Yugoslav heirs residing in Yugoslavia were based on findings of fact that the requirements of the Montana "reciprocity" statute had been met, and wholly without regard to Article II of the Convention, which is mentioned only in the dissent in the latter. The favorable decision of the Oregon Circuit Court, reversed by the Court below, was similarly based. App. C, pp. 33a-37a, *infra*. Between 1953, when *Arbulich* was decided, and 1958, in eleven northern counties of California alone, there were more than forty-five cases involving decedent

estates in which Yugoslavs not within the United States were beneficiaries. R-770-772. See also, App. II, p. 66a, *infra*.

**4. Whether a State may deprive citizens and residents of foreign countries, signatories with the United States to the International Monetary Fund Agreement, of the capacity to inherit solely because such countries maintain foreign exchange controls consistent with such Agreement, is a federal question of substance which has not been determined by this Court.** Some sixty-eight nations, including the United States and Yugoslavia, are parties to the Agreement and members of the International Monetary Fund which it established. Of these, all except a small minority maintain or impose foreign exchange controls which vary in stringency and extent from country to country, and from time to time, in accordance with economic necessity. By becoming a party to the Agreement and a member of the Fund, the United States necessarily gave its recognition and acceptance to foreign exchange controls maintained or imposed by other parties to it consistently with the Agreement. See, *e.g.*, Art. VIII, Sec. 2(b), App. E, p. 45a, *infra*. But what becomes of such recognition and acceptance if, as the holding of the Court below implies, each of the fifty States of the United States can put sanctions on the nations maintaining such controls, by making the citizens and residents of any such nation incapable of inheriting, or by some other device? And what becomes of the exclusive authority of the federal government in matters of foreign policy and foreign affairs? Although the Agreement is not a treaty in the Constitutional sense, the United States became a party to it pursuant to an act of Congress. Bretton Woods Agreements Act, Sec. 2; 59 Stat.

512; Tit. 22 U.S.C. Sec. 286. The adherence of the United States to the Agreement is an expression and implementation of foreign policy no less than what was involved in *United States v. Pink*, 315 U.S. 203 (1942), and the application to these petitioners of the Oregon statute for the reason given by the Court below, is no less an attempt by a State to rewrite foreign policy to conform to its domestic policies, than was the action of New York there condemned. See, *Perutz v. Bohemian Discount Bank*, 304 N.Y. 533, 110 N.E. 2d 6 (1953). In view of the large number of foreign nations that maintain exchange controls consistent with the International Monetary Fund Agreement, and the substantial number of States that have "reciprocity" statutes similar to Oregon's, the question here raised of the impact of the one upon the other, should be determined by this Court.

In *Perutz v. Bohemian Discount Bank*, *supra*, the New York Court of Appeals, expressly recalling *United States v. Pink*, *supra*, held, 110 N.E. 2d at 7, that:

A contract made in a foreign country by citizens thereof, and intended by them to be there performed, is governed by the law of that country.

\* \* \* Our courts may, however, refuse to give effect to a foreign law that is contrary to our public policy. \* \* \* But the Czechoslovakian currency control laws in question cannot here be deemed offensive on that score, since our Federal Government and the Czechoslovakian Government are members of the International Monetary Fund

If, then, the adherence of the United States to the International Monetary Fund Agreement, precludes a State from considering the foreign exchange con-

trols of a foreign country also adhering to the Agreement, as being contrary to its public policy, it would seem to follow that there is a substantial question whether a State may make the existence of such laws a ground for denying capacity to inherit to citizens and residents of that country, who otherwise have such capacity under the laws of the State. For, granting that in the absence of supervening treaty rights, a State may deny rights of inheritance to all aliens, or to all aliens living in a foreign country, or to aliens whose countries do not permit Americans to inherit, it does *not* follow that a State whose laws permit aliens, resident and non-resident alike, *generally* to inherit, may withhold that privilege from some non-resident aliens for reasons of public policy that conflict with policies and action of the federal government in an area committed to it exclusively by the Constitution.

Thus, in *Oyama v. California*, 332 U.S. 633 (1948), six justices concurred in striking down that part of a California land-ownership statute which treated the American citizen children of aliens ineligible for citizenship differently from other American citizens. The opinion of Court (per Vinson, C. J.) relied, in substantial measure, on the existence of federal legislation providing that in every State, all citizens of the United States shall have the same right to take and hold real property.<sup>10</sup> 332 U.S. at 640, 646, while two of the concurring justices (Black and Douglas, JJ.) took the view, 332 U.S. at 647-650, in substance, that while a State could prohibit land ownership to *all* aliens, it could not single out for such prohibition aliens not eligible for citizenship, when the federal government, in the exercise of its exclusive authority in matters of foreign relations and immigration, had

<sup>10</sup> Rev. Stat. Sec. 1978, Tit. 42 U.S.C. Sec. 1982.

by treaty and statute permitted such aliens to immigrate to the United States. In view of the statutory basis of the adherence of the United States to the International Monetary Fund Agreement, and the foreign policy considerations involved in such adherence, both the opinion of the Chief Justice, apparently concurred in *sub silentio* by Mr. Justice Frankfurter, and the opinion of Mr. Justice Black, concurred in by Mr. Justice Douglas, raise serious doubt whether, when the consequence is discrimination against its citizens and residents, the test of paragraph (b) of the Oregon statute here involved, App. F, p. 48a, *infra*, can be held not to be met by a foreign country which adheres to the Agreement, solely because it maintains foreign exchange regulations consistent with it.<sup>11</sup>

<sup>11</sup> In this connection it should be noted that Article VI, Section 2 of the Agreement expressly permits its signatories to "exercise such controls as are necessary to regulate international capital movements . . ." and, indeed, under Section 1 of that Article, may be subject to sanctions under certain circumstances, if they do not impose such controls. App. E, p. 43a, *infra*. That the significance of this provision was understood by both the proponents and opponents of the Agreement is clear. See, e.g., the colloquy between Senator Taft and Mr. Acheson, then Assistant Secretary of State, in Hearings before the Committee on Banking and Currency, United States Senate, 79th Cong., 1st Sess., on H.R. 3314, p. 32. The control of "current international" transfers, as distinguished from "international capital" transfers, is dealt with in Article XIV of the Agreement, App. E, pp. 45a-46a, *infra*. Current international transfers are such as are made for the purchase and sale of goods, payments of interest on loans or the net income on investments, etc. Article XIX(i), App. E, p. 47a, *infra*; Hearings before the Committee on Banking and Currency, House of Representatives, 79th Cong., 1st Sess., on H.R. 2211, p. 37. Capital transfers are thus basically those where no *quid pro quo* is involved, as in the case of payments of the distributive shares of decedent estates. But even if such payments should be considered "current" transfers, their control is permitted under Article XIV of the Agreement, App. E, pp. 45a, 46a, *infra*.

**CONCLUSION**

The questions raised by this petition are federal questions of substance not heretofore decided by this Court. The decision of the Court below is not in accord with applicable decisions of this Court. Its construction of Article II of the Convention would frustrate its purpose, and its failure to give effect to the Agreement would subordinate federal foreign policy to a State's domestic policy.

The petition should be granted.

Respectfully submitted,

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# **APPENDIX**

**APPENDIX A.**

No. 6401—January 13, 1960

IN THE SUPREME COURT OF THE STATE OF OREGON

Department 2.

IN THE MATTER OF THE ESTATE OF  
JOE STOICH, DECEASED

STATE LAND BOARD, *Appellant*,

v.

KOLOVRAT, ET AL, *Respondents*.

IN THE MATTER OF THE ESTATE OF  
MUHAREM ZEKICH, DECEASED

STATE LAND BOARD, *Appellant*,

y.

ZEKIC, ET AL, *Respondents*.

Appeals from Circuit Court, Multnomah County.

JAMES W. CRAWFORD, Judge.

Argued and submitted December 16, 1959.

*Catherine Zorn*, Assistant Attorney General, Salem, argued the cause for appellant. With her on the briefs was Robert Y. Thornton, Attorney General, Salem.

*Peter A. Schwabe*, Portland, argued the cause and filed a brief for respondents.

Before McALLISTER, Chief Justice, and LUSK, WARNER and SLOAN, Justices.

REVERSED.

WARNER, J.

We are presented with an appeal from decrees in the estates of Joe Stoich and Muharem Zekich, arising from

proceedings for escheat in each estate instituted by the State Land Board, hereinafter referred to as the State.

Stoich died intestate in Multnomah county on December 6, 1953, leaving as his only heirs a sister, four nephews, and three nieces, all residents of Yugoslavia.

Zekich likewise died intestate in the same county on December 17, 1953, leaving as his only heirs two sisters, two brothers, two nephews, and three nieces, who are also residents of Yugoslavia.

All the heirs of each decedent are made parties defendant and appear therein by their attorneys in fact.

Because of the similarity of basic facts and questions of law common to both proceedings, the two matters were consolidated in the probate court for the purpose of trial and later consolidated in this court for the purpose of argument.

The position of the State is: that each decedent died without heirs or next of kin entitled to receive any part of his or her relative estate. It premises its case upon ORS 111.070 (Oregon Laws 1951, ch 519, § 1).

From orders denying the State's petitions for escheat and determining the right of the several defendants as alien heirs to take their respective distributive shares in the estates to which they lay claim, the State appeals.

This is the first appeal to reach this court from orders made pursuant to ORS 111.070, *supra*. Heretofore, all of the appeals in like matters had their origin in the earlier counterpart to the present statute, namely, § 61-107, OCLA (Oregon Laws 1937, ch 399, § 1).<sup>1</sup>

ORS 111.070, the controlling statute, provides:

“(1) The right of an alien not residing within the United States or its territories to take either real or

<sup>1</sup> The provisions of § 61-107, OCLA, in their entirety will be found in *State Land Board v. Rogers*, — Or —, 347 P2d 57, decided December 2, 1959.

personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

“(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

“(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

“(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

“(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

“(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property.”

Speaking generally, the principal differences between the present statute and the former one dealing with the rights of aliens to take inheritances in Oregon estates are: (1) the significant words “in like manner”<sup>2</sup> do not appear in ORS 111.070, *supra*, thereby making the reciprocal requirements of the statute read as does its California counterpart on that subject (West, Annotated California Probate Code,

<sup>2</sup> See *In Re Estate of Krachler*, 199 Or 448, 263 P2d 769, what is there said at pp. 458 et seq. concerning the important significance of the words “in like manner,” now deleted.

528 § 259): (2) the present act embraces inheritances in real, as well as personal, property; and (3) adds, as an additional condition to the taking, subsection (c) of Section 1, requiring proof that foreign heirs will receive their legacies without diminution by the government of the country where they claim citizenship.

The present act, as before, imposes on the alien non-resident heir the burden of proving the existence of the conditions precedent to qualifying one to take an inheritance in this state. These concurring conditions are: (1) that a reciprocal right existed as of the date of the decedent's death on the part of American citizens to take property from estates in the foreign country in which the alien resides, upon the same terms and conditions as the inhabitants and citizens of that foreign country; (2) that American citizens have the right to receive by payment to them within the United States moneys originating from estates in the foreign country; and (3) that the heirs and legatees in the foreign country will have the use, benefit and control of money or property originating from Oregon estates without confiscation by the foreign government.<sup>3</sup> Failure to sustain the burden imposed upon alien heirs by the preponderance of evidence as to any one of these three items of proof of right results in defeating the claim of the alien to take under the statute. *In re Estate of Krachler*, 199 Or 448, 263 P2d 769; *State Land Board v. Rogers*, — Or —, 347 P2d 57, 59, decided December 2, 1959.

<sup>3</sup> Because of the frequency of reference to the California statute, *supra*, the decisions made in the instant appeal and our earlier decisions, we note that the California statute is unlike the current Oregon act in two noteworthy particulars: (1) it does not require evidence of the right of an American citizen to receive payment from a foreign estate in this country; or (2) proof that an alien heir to an estate in the United States will receive money from an estate here without diminution by acts of the government of the alien heir. See § 259 of California Probate Code, *supra*.

The defendant heirs claims to have met the burden in every particular.

ORS 111.070 is, as was its predecessor, § 61-107, OCLA, a law of succession, which governs the rights of nonresident aliens to take and receive property in the estate of an Oregon decedent. *In re Estate of Krachler*, supra (199 Or at 454); *In re Knutzen's Estate*, 41 Cal2d 573, 191 P2d 747, 751. The date of death controls the succession to the property and the three required rights under ORS 111.070, supra, must be shown to have so existed under the law of the country of alien claimant as of that date. *In re Estate of Krachler*, supra, (199 Or at 453); *State Land Board v. Rogers*, supra (347 P2d at 61).

The "rights" of which we speak, as employed in the current statute, have been defined to mean an unqualified right, enforceable at law. *In re Estate of Krachler*, supra (199 Or at 455, 457 and 502), and "definitely ascertainable" *In re Arbulich's Estate*, 41 Cal2d 86, 257 P2d 433, 439. These definitions exclude the concept of a right which may in any sense be limited or dependent upon an act of discretion or grace upon the part of any governmental authority or agency.

We have also held that the second right, i.e., the right to receive, means delivery of the proceeds of an inheritance from a foreign estate, not in the country where the foreign decedent left property, but a delivery to an Oregon heir in the United States or its territories, originated and implemented by some one authorized to make distribution and delivery of inheritances to the decedent's Oregon heir. *State Land Board v. Rogers*, supra. Moreover, the second right is not reciprocal in character; that is to say, it is not dependent upon the existence of a law of the foreign country that the alien heirs and nationals of that foreign country who take from an Oregon estate must receive delivery of their Oregon legacy within the territory of that country. It is only the "right to take" which must be reciprocal in

character. *State Land Board v. Rogers*, supra (347 P2d at 60).

In determining this appeal, we find it only necessary to address ourselves to the question of the existence or non-existence of the second right under the Yugoslavian law; that is, whether there is a certain and enforceable right vested in American citizens to receive the proceeds of a Yugoslavian inheritance in this country.

At the outset, we note that the defendants have placed much in the record concerning laws, regulations and customs prevailing in Yugoslavia at the time of the trial (April, 1957) which may have come into existence subsequent to December, 1953 (the crucial date for the determination of the rights of the Yugoslavian heirs to take the estates involved in this proceeding). It is, therefore, not always clear to us whether all of the given matter reflected by approximately 85 documents apply to things existing in December, 1953, or to matters arising thereafter. This is well exemplified with reference to the current Article 8 of the Yugoslavian Foreign Exchange Law upon which the defendants rest no small part of their argument, and to which we will later make fuller reference.

The exchange laws and regulations of a given country have been recognized or treated as conclusively determinative of an Oregon citizen's right to receive his inheritance "within the United States or its territories." *In re Estate of Krachler*, supra (199 Or at 478); *State Land Board v. Rogers*, supra (347 P2d at 61).

The Yugoslavian Law Regulating Foreign Payments (Foreign Exchange Law), hereinafter referred to as the Law, as it was in 1947, and being the Law of Foreign Exchange as adopted in 1945, is set out in substantial entirety in *In re Arbulich's Estate*, supra (257 P2d at 438-439).<sup>4</sup>

<sup>4</sup> The pertinent articles of the Foreign Exchange Law, as disclosed in *In Re Arbulich's Estate*, supra (257 P2d at 438-439) read:

Footnote 1, continued

### “Article 1

“All financial transactions with foreign countries, as well as all transactions within the country in relation to foreign countries that may affect the development of the credit balance of our country and the international value of our domestic currency (foreign exchange transactions) are subject to the control of the Federal Minister of Finance (foreign exchange control).

### “Article 2

“Primarily the following transactions are subject to control:

“(a) All transactions within the country and with foreign countries: in foreign exchange, claims and debts in foreign currency and other values in foreign currency;

“(b) All transactions with foreign countries: in domestic currency, credits and debts in domestic currency and other values in domestic currency;

“(c) All transactions with foreigners within the country, causing changes in property relations between our country and foreign countries; and \* \* \*

### “Article 3.

“The term *transaction* from Articles 1 and 2 as used in this law means the transfer of values and metals and payments, it also means the establishment, cancellation and change of obligations and actual rights to values and metals, as well as changes of holders of rights and obligations.

### “Article 4

“Permission must be had for transactions described in Articles 1 and 2 of this Law according to foreign exchange regulations.

### “Article 5

“It is forbidden to conclude business in the country the amount of which in domestic currency is tied to gold or some foreign currency. \* \* \*

### “Article 6

“(1) The Federal Minister of Finance as the supreme foreign exchange authority, exercises his control over foreign exchange through: [various agencies] \* \* \*

“(2) The Federal Minister of Finance regulates the limits of jurisdiction as between the foreign exchange authorities in regard

*Footnote 1, continued*

to the exercising of foreign exchange control, be it by Regulations from Article 25 of this Law, or by separate decisions.

**Article 7**

"(1) Transactions, subject to foreign exchange control according to this Law, may be conducted only by persons and establishments authorized to do so by the competent foreign exchange authorities, unless the conduct of such business is permitted by the foreign exchange rules themselves.

**Article 8**

"The National Bank, whenever authorized by the Federal Minister of Finance, may at any time request the holders in the country to offer for sale to the National Bank all their foreign exchange (regardless whether it be in the shape of claims in foreign currency, checks, drafts, et c.), foreign currency, foreign values and precious metals. If the National Bank decides to buy, it shall fix the terms, \* \* \*

**Article 12**

"(1) The term 'devisa' as used in the foreign exchange regulations means a claim abroad on whatever basis, in whatever currency, regardless of the manner of disposal \* \* \*.

**Article 13**

"(1) The term *foreigners* as used in this Law means all persons and corporations with permanent residence or seat abroad, regardless of citizenship of persons and ownership of enterprises.

"(2) The term *domestic persons* means all persons and corporations with permanent residence or seat within the country, regardless of citizenship of persons and ownership of enterprises.  
\* \* \*

**Article 16**

"(1) The penalties for foreign exchange infractions are: \* \* \*

"2. Confiscation of objects or values constituting the foreign exchange infraction, in full or in part. \* \* \*

"(2) The Federal Minister of Finance shall pronounce penalties.

**Article 25**

"The Federal Minister of Finance shall issue more detailed rules, regulations and decisions for the execution of this Law, upon consulting the National Bank. \* \* \*

Since 1945 is it evident from the following recital in the certificate accompanying Exhibit 30 that the Law was amended in 1946, 1951 and 1954. This certificate reads:

"In the Federal People's Republic of Yugoslavia are in force:

"I

"The Law regulating foreign payments (Foreign Exchange Law) published in the 'Official Gazette' of the FPR of Yugoslavia No. 86 of October 23, 1946, corrected and changed on the 8th October 1951 ('Official Gazette of the FPR of Yugoslavia' No. 46 1951) and on the 26th January 1954 ('Official Gazette of the FPR of Yugoslavia' No. 5 1954) which reads as follows:

Notwithstanding this element of uncertainty as to what precisely was the Foreign Exchange Law in December, 1953, in contrast to what it was in 1947, we find upon examination little change in substance or legal effect wrought by the amendments made since 1947. Because of defendants' failure to supply the record with copies of the amendments, showing when made or other evidence of like character, we feel justified in assuming that the 1945 Exchange Law remained in effect during December, 1953. *Rusk v. Montgomery*, 80 Or 93, 101, 156 P 435; *Weygandt v. Bartle*, 88 Or 310, 317, 171 P 587; 31 CJS 744, Evidence § 124(4). See, also, *State ex rel. Grismer v. Merger Mines Corp.*, 3 Wash2d 417, 101 P2d 308, 310, where the rule is applied to the law of a foreign jurisdiction; *Martinez v. Gutierrez* (Tex), 66 SW2d 678; 31 CJS, supra, at 769.

Subsections (a), (b) and (c) of Article 2 of the Law of 1945, and as it was in 1946, single out the following transactions as the primary subjects of control:

"Primarily the following transactions are subject to control:

"(a) All transactions within the country and with foreign countries: in foreign exchange, claims and

debts in foreign currency and other values in foreign currency;

"(b) All transactions with foreign countries; in domestic currency, credits and debits in domestic currency and other values in domestic currency;

"(c) All transactions with foreigners within the country, causing changes in property relations between our country and foreign countries; and \* \* \*"

The changes between Articles 1 and 2 of the Law of 1945 and as the same numbered articles appear in Exhibit 30 are immaterial.

*In re Arbutich*, to which we have made several previous references (decided May 26, 1953), is one of especial force and significance here. It was a proceeding to determine heirship in the estate of a California decedent which was claimed by a brother residing in the United States and by another brother who resided in and was a national of Yugoslavia. The decedent and the brother residing in California were former nationals of that country. The Superior Court entered a judgment to the effect that the brother residing in the United States was entitled to distribution of the entire estate. The Yugoslavian brother appealed. The Supreme Court held that evidence was sufficient to support the finding that on March 21, 1947, when decedent died, the rights of inheritance prescribed by § 259 of the California Probate Code did not exist with respect to either real or personal property as between the residents and citizens of the United States and Yugoslavia. Among other documents of importance before the court was the Foreign Exchange Law which we now review.

The court took notice of the amendments made to the 1945 Law in October, 1946, referring particularly to Article 24, as so amended (257 P2d at 439), saying:

"The second decree, effective October 25, 1946, confirms the decree of September 7, 1945, and amends it

in various respects which appear to be largely immaterial here. However, Article 24 of the second decree [i.e., October, 1946], provides that 'The Minister of Finance of FPRY is herewith authorized to issue regulations, instructions, orders and decrees, for the execution of this law,' \* \* \*."

We, therefore, feel warranted in saying that Article 24, as thus referred to in Arbulich, is identical with Article 24 as found in Exhibit 30 of the instant matter and the slight differences appearing may be credited to differences in translation. This justifies our conclusion that Article 24, as above quoted in Arbulich, was an integral and important element of the Law in December, 1953.

The court, continuing, stated:

"Appellant urges that the 'Foreign Exchange Law' has no materiality in relation to the question of reciprocity; that it is merely 'regulatory of foreign exchange and has no reference whatever to rights of inheritance.' But a reading of entire substance of the documents mentioned makes it apparent that the trial court was justified in reaching the conclusion that under Yugoslav law a citizen of the United States, at the time of decedent's death, had no definitely ascertainable and enforceable right to *receive* Yugoslav property by testament, and that the receipt of any such property would depend in each case upon the largely, if not entirely, uncontrolled discretion of the Minister of Finance. This is far different from a standardized regulation which might merely delay the transmission of gold, money, or other stores of value from one nation to another. \* \* \* (257 P2d at 439)

We also say, as did the California court, the Law has the effect of "confirming the apparently unlimited power of the Minister of Finance over foreign exchange transactions" and the absence of any "definitely ascertainable and enforceable right to *receive* Yugoslav property by testament, and that the receipt of any such property would de-

pend in each case upon the largely, if not entirely, uncontrolled discretion of the Minister of Finance."

The rules authorized by Article 25 of the Law for the implementation of the regulation of foreign payments (hereinafter referred to as the Rules) are found in Exhibit 31. They capture and intensify the absolute control of foreign exchange which the Law reposes in the Minister of Finance. This is illustrated by pertinent parts included in marginal footnote.<sup>5</sup>

### "Foreign Exchange Regulations

#### "Article 1

"Foreign exchange operations can be pursued only in accordance with the foreign exchange regulations, as well as authorization and permits delivered on the basis of the said regulations.

#### "Article 2

"1. The export of any means of payment and securities both in domestic and foreign currency, in any form (effective currency, foreign exchange, securities, coupons, etc.), both directly or indirectly (through other persons, the postoffice, etc.) *is not allowed without the permission of the competent foreign exchange authorities*, issued in conformity with the foreign exchange regulations. The export is exceptionally allowed in cases which are regulated in general, by the foreign exchange regulations (for instance, in passenger traffic).

"2. From foreign exchange regulations are exempted all exports of values enumerated in the present Article, effected by the Federal Ministry of Finance and the National Bank.

. . . . .

#### "Article 12

"1. Foreign exchange operations may be pursued exclusively on the basis of permits issued by the competent foreign exchange authorities, if these operations are not allowed by the foreign exchange regulations themselves.

. . . . .

"3. Likewise, all claims abroad which are not specifically mentioned in the foreign exchange regulations can be settled only

The record is replete with evidence of remittances from estates in Yugoslavia to persons in the United States and the testimony of Yugoslavian consular representatives and experts called by the defendants concerning the movement of such funds, all offered as proof that American citizens have in the past received their legacies by delivery in the United States. This phase of the case is further amplified by self-serving declarations of the same tenor from Yugoslavian diplomatic representatives to the State Department and documents emanating from officials in that country. Much of this is immaterial, having dates subsequent to December, 1953, or lacking of any identifying dates; some are deficient in other respects which are unnecessary to note because we are compelled to reject all evidence of this character as legally inconclusive of the problem we now have under consideration. Moreover, the testimony of the Yugoslavian officials, including the diplomatic correspondence referred to, serves at most to create a conflict in the evidence as to the ultimate fact of whether or not there exists as a *matter of law an unqualified and enforceable right to receive* as defined by ORS 111.070, *supra*. Nor is this answered by evidence that some American citizens have enjoyed the "right to receive" the proceeds of their respective inheritances in whole or in part. The real test is whether *all* American citizens under the law of Yugoslavia can demand and enforce that right under the law in contradistinction to a dependency upon the good will or gracious indulgence of some official of that country.

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after the permission of the Banking and Currency Department of the Federal Ministry of Finance has been obtained.

#### "Article 13

• • • • •  
 "3. Foreign exchange operations depending on the authorization of foreign exchange authorities can be pursued exclusively by the persons to whom these permits have been issued on the basis of original permits." (Emphasis ours.)

Even if it can be said these items of evidence do reveal a flow of exchange from Yugoslavia to American heirs as of December, 1953, they, at the most, only attest the indulgence of the Yugoslavian authorities as to the American heirs as of that time. Certainly, as discretionary acts, permissible under the Law, they do not evidence the presence of an unqualified and enforceable right to receive by delivery of funds in the United States to citizens thereof under the foreign exchange laws and regulations of that country in 1953. The fact that some American citizens were so favored does not preclude wonderment as to how many may have been denied "the right to receive" or, indeed, whether those who did receive moneys by exchange, received all or only a part thereof. This line of evidence has many of the characteristics noted by Mr. Justice BRAND in the *Kraehler* case, *supra* (199 Or at 499-502). What was done yesterday "as a matter of course" in the exercise of powers of discretion may not be the rule or custom of tomorrow. *State Land Board v. Rogers*, *supra* (247 P2d at 63).

Unless the area of alien succession over which the state of Oregon seeks to control through ORS 111.070, *supra*, has been preempted by some treaty agreement subsisting between Yugoslavia and the United States as of December, 1953, we are of the opinion that both the Yugoslavian Foreign Exchange Laws and Regulations extant as of that date operate as a denial of the claims of the defendants.

We are mindful that rights of succession to property under local law may be affected by an overriding federal policy when a treaty makes different or conflicting arrangements. In such event, the state policy must give way. *Clark v. Allen*, 331 US 503, 517, 91 L ed 1633, 1645, 67 S Ct 1431.

By way of circumventing the adverse effect of the Yugoslavian Law and Regulations, the defendants place great reliance upon their interpretation of Article II of the Convention for Facilitating and Developing Commercial Re-

lations (sometimes called the Convention of Commerce and Navigation and by us hereinafter called the Treaty of 1881) as concluded on October 2/14, 1881, between the United States of America and Serbia (now a constituent part of Yugoslavia" (22 Stat 963, Treaty series 319). It is before us at Exhibit 9.

Article II of the Treaty of 1881 reads:

"In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.

"Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sales, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their

"Its present and continuing effectiveness is attested by The Settlement of Pecuniary Claims Against Yugoslavia Agreement between the United States of America and that country of July 19, 1948 (Exhibit 7 herein), as is confirmed by Article 5, reading:

"The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia, or of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2-14, 1881."

goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state."

Proceeding on the theory that Article II of the Treaty of 1881 embraces the "right to receive," as well as the "right to take," the respondents rely on Article 8 of the Law, supra, offered by them as Exhibit 28 as an exception to the operation of the Foreign Exchange Law in so far as the "provisions of agreements with foreign countries are concerned with payment." The provisions of Article 8 of the current Law as reflected by that exhibit read:

"The term 'foreign exchange regulations' refers to the provisions of the present Law, to the provisions of the Rules for the implementation of the present Law, to the orders, instructions and decisions of the Ministry of Finance of the FPR of Yugoslavia, made on the basis of the present Law; to all the regulations relating to the control of imports and exports enacted by the Minister of Foreign Trade of the FPR of Yugoslavia, as well as to the provisions of agreements with foreign countries which are concerned with payments."

As we have previously observed, at pages 438 and 439 of *In re Arbulich's Estate*, supra, there is spread with great detail the Yugoslavian Foreign Exchange Law as it was at that time. Comparing Article 8 of the Law as it was then with the current Article 8 of the same Law indicates some amendments since 1947. But when? Was Article 8, as above quoted, in effect in December, 1953, or was it so enacted subsequent to that time? Although pressed by counsel for the state, the defendants' witness Temer, the Consul General of the Yugoslavian Consulate at San Francisco, was unable to say whether the current Article 8 of the Law was effective in December, 1953.

Assuming arguendo that the current Article 8 of the Law was prevailing in December, 1953, we find no difficulty in

concluding that it gives some recognition to the provisions of Article II of the Treaty of 1881. But it is only to the extent that Article II has any impact upon the "right to receive" as defined by ORS 111.070, *supra*, would the later Article 8 become a matter of interest. We think, notwithstanding what may be the date of its enactment, that it has no bearing on our present problem.

*Clark v. Allen*, *supra*, decided June 9, 1947, becomes a holding of prime interest in this matter in that it was precipitated by a proceeding initiated under § 259, California Probate Code, as it was in 1942. It will be remembered that section bears upon the rights of aliens not residing in the United States to take real or personal property in the state of California.<sup>7</sup> And for the further reason that it construes a treaty provision similar to Article II of the Treaty of 1881.

In the *Clark* case, Alvina Wagner, a resident of California, died in 1942. She left real and personal property situated in that state. By a will, dated December 23, 1941, she bequeathed her entire estate to four relatives who were nationals and residents of Germany. Six heirs at law, who were residents of California, filed a petition for determination of heirship in the probate proceeding, claiming that the German nationals were ineligible as legatees under § 259, *supra*, of the California Probate Code. It appears that at the time of the decision in *Clark*, there had never been a hearing on that petition. This, for the reason that in 1943 the Alien Property Custodian vested in himself all right, title and interest of the German nationals in Mrs. Wagner's estate. The Property Custodian thereupon instituted an action in the U. S. District Court against the executor under the will and the California heirs at law for a determination that the California heirs had no interest in the estate and that he was entitled to the entire net estate upon

<sup>7</sup> Sections 259 and 259.2 of the California Code, *supra*, are identical with ORS 111.070 (1) (a) and (b) and subsection (3).

the conclusion of the administration. The District Court granted judgment for the Custodian on the pleadings (52 F Sup 850). The Circuit Court of Appeals reversed, holding that the District Court was without jurisdiction of the subject matter (147 F2d 136). The case went thence to the Supreme Court on certiorari where it was held that the District Court had jurisdiction of the suit and remanded the cause to the Circuit Court of Appeals (9th CC) for consideration on the merits (326 US 490). The Circuit Court of Appeals thereafter held for the California heirs (156 F2d 653). The case was returned again to the Supreme Court on a petition for a writ of certiorari which was granted on the ground that the issues raised were of national importance.

The defendants concede that the Clark case over the years has, since its pronouncement, in 1947, come to be regarded as "the cornerstone of the entire reciprocal inheritance rights structure as it was the first major decision by a court of last resort on the California reciprocity statute."

In *Clark v. Allen*, supra, the court was called upon to construe Article IV of the Treaty of Friendship, Commerce and Consular Rights made with Germany December 8, 1923 (44 Stat 2132). It had different provisions relating to the testamentary disposition of realty and personalty. Article IV of the Treaty, which is the provision of our interest, contained the following provisions as to the disposition of personalty:

*"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals*

*of the High Contracting Party within whose territories* such property may be or belong shall be liable to pay in like cases." (Emphasis ours.) (91 L. ed at 1644)

We are of the opinion that the following words and phrases found in the German Treaty of 1923: "Nationals of either High Contracting Party \* \* \* within the territories of the other" are of the same import and meaning as the words and phrases found in Article II of the Treaty of 1881; that is, "citizens of the United States in Serbia and Serbian subjects in the United States," a phrasing which the defendants ascribe to Victorian English.

In the Clark case, it was held that the language of Article IV of the German Treaty applied only to nationals of either of the party nations who were *within* the territory of the other. Mr. Justice Douglas speaking for the court, says at 61644 L. ed:

"\* \* \* In case of personalty, the provision governs the right of 'nationals' of either contracting party to dispose of their property within the territory of the 'other' contracting party; and it is 'such personal property' that the 'heirs, legatees and donees' are entitled to take.

"Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson v. Louisiana*, 23 How (US) 445, 16 L. ed 577, *supra*, and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But we do not stop to review that history. For the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it.

"We accordingly hold that Article IV of the treaty does not cover personalty located in this country and

which an American citizen undertakes to leave to German nationals. . . .

The Supreme Court of California also had before it the provisions of Article II of the Treaty of 1881 in the *Arbulich* case, *supra*, which were there urged, as here, as applicable and controlling in favor of the appellant brother. Concerning this, Mr. Justice Schauer, who spoke for the court, stated:

"Appellant contends, nevertheless, that the provisions of Article II of a treaty entered into in 1881 between the United States and the Kingdom of Serbia, 22 Stat. 964 (of which the present Republic of Yugoslavia is the successor government) and certified by the Secretary of State of the United States as remaining in full force and effect between this country and Yugoslavia, are applicable and controlling in appellant's favor on the issue of reciprocity. It may be noted that the first paragraph of Article II seemingly treats only of 'citizens of the United States in Serbia [Yugoslavia] and Serbian [Yugoslav] subjects in the United States,' rather than, as is the situation in the present case, of a United States citizen who dies in the United States and leaves property to a Yugoslav subject who is in *Yugoslavia*, and therefore is not here applicable. Even if we assume its applicability in that respect, however, the rights granted are only those given by each of the contracting nations 'to the subjects of the most favored nation,' and do not purport to equal the rights given or guaranteed by each of the contracting nations to *its own* citizens. Consequently the treaty provisions do not establish the reciprocal rights required by the Probate Code." (257 P2d at 437)

In that holding, we find the California court, and we think rightly, following the pattern of interpretation accorded the German treaty before the United States Supreme Court six years before in *Clark v. Allen*, *supra*. We take notice that a writ of certiorari in *Arbulich* was denied by the Supreme Court of the United States (345 US 897, 98 L ed 398, 74 S Ct 219) and later a petition for leave to file a peti-

tion for rehearing was also denied (347 U.S. 908, 98 L. ed 1006, 74 S. Ct 426).

If we correctly appraise the position of defendants, they would, notwithstanding the doctrine of *Clark v. Allen*, supra, have us interpret the words "in Serbia" and "in the United States," as they appear in Article II of the Treaty of 1881, as referring to the place where property rights are granted rather than to the geographical location of the person claiming them. If thus construed the provision would accord to the nationals of either party wherever resident rights similar to those enjoyed by nationals of the most favored nation wherever resident. But this we decline to do, being impressed that the construction given to the German Treaty in the Clark case applies with equal force to the Serbian Treaty of 1881, and as also held in *Arbulich's Estate*.

At the time of *In re Arbulich*, as well as in 1953, the California state code (see § 259 California Probate Code) carried no provision comparable to subsection (3) of § 1 of ORS 111.070, requiring, as does the Oregon statute, the right "to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country." The right to receive as discussed by the court in *Arbulich*, was without the mandatory direction of the California act or that it be a receipt by delivery in the United States. In this respect, the Oregon act is much more stringent than the provisions of the California Probate Code or similar codes that have come to our attention. It is a difference which may well account for the ruling of the Los Angeles Superior Court of California in *Miloglav's Estate*, No. 301394, May 5, 1954, and which comes to our notice via defendants' Appendix F.

We are not informed as to the reasons which prompted the reenactment of subsection (b) of § (1) of ORS 111.070 in 1951, and as it was in § 61-107, OCLA, nor the new pro-

vision, subsection (c), of the same section of the present act relating to assurances that foreign beneficiaries of an Oregon estate receive the avails of their shares without confiscation by the government of the country in which said beneficiaries resided. But whatever was the legislative purpose, whether to circumvent then known practices of certain governments by way of diminishing or confiscating inheritances received by some of their citizens from Oregon estates or in barring the free movement of foreign inheritances to Oregon beneficiaries, we think it was clearly within the legislative province to prescribe the various conditions found in ORS 111.070. The protective solicitude by our legislature demonstrated by the provisions of ORS 111.070 in behalf of Oregon citizens is extended to alien heirs residing in foreign countries who inherit in Oregon. In short, the net result when observed, at least on the part of the state of Oregon, brings ORS 111.070 more in harmony with the spirit of the international agreements as contended for by defendants than their interpretation of those treaties demand. In effect, subsections (b) and (c) of § (f) of that statute place local heirs and alien heirs on a parity by insuring to each the full measure of their respective inheritances. We deem both of these conditions a reasonable exercise of legislative power, and in no sense trespassing upon any international treaty or agreement brought to our attention, but to the contrary implementing the spirit, if not the letter, of such accords.

In arriving at our conclusions, we have given attention to the terms of what is commonly known as the Bretton Woods Agreement of 1944, cited by the defendants. Yugoslavia was one of the 44 participating governments at the United Nations Monetary and Financial Conference of that year. Later, it became one of the signatories to the Articles of Agreement formulated as the final act of the conference. The major features of the final document provided for establishment of the International Monetary Fund and of the International Bank for Reconstruction and Develop-

ment. It is common knowledge that the conference was motivated by the then prevailing international apprehension world economy would suffer seriously as an aftermath of World War II unless some devices to stabilize it were quickly undertaken by the world powers. This thought is clearly affirmed by Article I of that agreement, wherein its controlling purposes and objectives are stated.

The defendants, however, point to its Art XIV, § 4 and Art XI, § 2, which provide sanctions against any member nation which imposes foreign exchange restrictions contrary to the provisions of the agreement. Although not fully developed by defendants' argument, the inference is that a foreign exchange system of controls and regulations was established thereby which would nullify the restrictive character of the Yugoslav Foreign Exchange Law and implementing Regulations. The contrary is clearly evident from a reading of the entire agreement. It is replete with expressions recognizing the want of economic parity between the signing nations and the relative difficulties of some of the lesser nations in maintaining a sound monetary system, and definitely places them in an exceptional class. We turn for the moment to one of the very articles to which they point. It is significantly captioned "Transitional Period." Section 2 of that article is subcaptioned "Exchange Restrictions." Its provisions are spread in marginal note.<sup>8</sup>

"In the post-war transitional period members may, notwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances (and, in the case of members whose territories have been occupied by the enemy, introduce where necessary) restrictions on payments and transfers for current international transactions. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the fund; and, *as soon as conditions permit*, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability. In particular, members shall withdraw restrictions maintained or

Article VII, § 3(b) of the agreement is also to the same tenor in recognizing that some nations will find the need to "impose limitations on the freedom of exchange operations."

The Bretton Woods Agreement gives no support to the thesis of defendants and, to the contrary, is in a large sense on international recognition that some countries, rightly or wrongly, would impose strictures such as are exemplified by the foreign exchange laws of Yugoslavia and Bulgaria (see *State Land Board v. Rogers*, supra).

By way of weakening or equivocating the applicability of *Clark v. Allen*, supra, we are cited the opinions of the California Attorney General, dated July 15, 1942, listing foreign nations of that time with whom the Attorney General deemed reciprocal inheritance rights existed by reason of treaties. This listing included Yugoslavia. Notwithstanding that such compilation was then made by the now Chief Justice of the United States, its persuasive value as to that nation was nullified 11 years later by *In re Arbulich's Estate* (1953). They also rely upon an opinion of the Oregon Attorney General given in 1938 (19 Op Atty Gen 136) to the same effect. But we are informed by the State's brief in this matter that this opinion has been abandoned by that office since the holding of *Clark v. Allen*, supra, in 1947.

Much of defendants' argument rests upon the mistaken premise that "the right to receive," which is the sole right to which we give attention in this matter, is reciprocal in character. This is contrary to the conclusion of *State Land Board v. Rogers*, supra. It is only "the right to take" that demands reciprocal legislation in a foreign country. This is but another reason why we do not find the provisions of

---

imposed under this Section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the resources of the Fund." (Emphasis ours.)

ORS 111.070 impinging upon any treaty existing between the United States and Yugoslavia.

During the course of the oral argument, counsel for the defendants laid great stress upon two diplomatic notes exchanged by the State Department and the Embassy of Yugoslavia. We were there led to believe that their net result was equivalent to a bilateral modification of the Treaty of 1881, giving to it a construction contrary to the doctrines as expressed in *Clark v. Allen*, supra; and *In re Arbulich's Estate*, supra.

This exchange was had in April, 1958, and hence not a part of the record of the trial court when it entered its decree in this matter in April, 1957. The defendants bring these notes to our attention via the filing of a supplemental brief. We pass the question of the propriety of bringing matters of that kind to this court under the circumstances, but observe they do not have the force and effect claimed for them even if they were ever properly made a part of the record. This is made patently manifest by the concluding paragraph of the note from the State Department in response to the query from the Yugoslavian Embassy, where it stated:

"This note, of course, is not to be considered as having the character of an international agreement or as effecting any modification of the treaty [The Treaty of 1881]."

We hold that the provisions of ORS 111.070 relating to the right of American citizens to receive a foreign inheritance by delivery in the United States or its territories, does not do violence to any treaty subsisting between this country and Yugoslavia in December, 1953. We also hold that the Yugoslavian Foreign Exchange Law and Foreign Exchange Regulations enacted pursuant thereto as they were as of that date negative the concept of an unqualified and enforceable right to receive delivery of Yugoslavian

inheritance in this country by an American citizen, but to the contrary make its receipt dependent upon the grace or sufferance of a Yugoslavian authority.

These conclusions make it unnecessary for us to give consideration to the claim of the defendants concerning the right of American citizens to take or inherit under Yugoslavian law or the sufficiency of the proof relating to the right of Yugoslavian citizens to receive an American inheritance without diminution by the government of that country. The failure to prove the legal existence of any one of the three conditions required by ORS 111.070 defeats the claims of succession to an Oregon inheritance.

The decree is reversed. Each party will pay own costs.

**APPENDIX B**

BE IT REMEMBERED that at a regular term of the Supreme Court of the State of Oregon begun and held at the court room in the city of Salem on the first Monday, the 5th day of October, 1959. WHEREUPON on this Tuesday, the 1st day of March, 1960, the same being the 46th judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice,  
 George Rossman, Associate Justice,  
 Hall S. Lusk, Associate Justice,  
 Harold J. Warner, Associate Justice,  
 William C. Perry, Associate Justice,  
 Gordon W. Sloan, Associate Justice,  
 Kenneth J. O'Connell, Associate Justice,  
 F. M. Sercombe, Clerk,

when the following proceedings were had:

**Appeals from Multnomah County**

In the Matter of the Estate of  
 Joe Stoich, deceased.

STATE OF OREGON, acting by and through the State Land  
 Board, *Appellant*

v.

ANJA KOLOVRAT, et al, *Respondents*

In the Matter of the Estate of  
 Muharem Zekic, deceased.

STATE OF OREGON, acting by and through the State Land  
 Board, *Appellant*

v.

LUTVO ZEKIC, et al, *Respondents*

The Court having duly considered respondents' petition for rehearing, and the Court being fully advised thereon,

IT HEREBY IS ORDERED that such petition be and the same hereby is denied.

BE IT REMEMBERED, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem on the first Monday, the 5th day of October, 1959. WHEREUPON on this Wednesday, the 13th day of January, 1960, the same being the 28th judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice,  
 George Rossman, Associate Justice,  
 Hall S. Lusk, Associate Justice,  
 Harold J. Warner, Associate Justice,  
 William C. Perry, Associate Justice,  
 Gordon W. Sloan, Associate Justice,  
 Kenneth J. O'Connell, Associate Justice,  
 F. M. Sercombe, Clerk,

when the following proceedings were had:

### **Appeal from Multnomah County**

In the Matter of the Estate of  
 Joe Stoich, deceased.

STATE OF OREGON, acting by and through the State Land  
 Board, *Appellant*

v.

ANĐIJA KOLĐVRAT, DRAGO STOJIC, DRAGICA SUNJIC, NEĐA  
 TURK, JOSIP BULGAN, JURE ZIVANOVIC, MARA TOLIC and  
 MILAN STOJIC, and also BRANKO KARADZOLE, Consul  
 General of Yugoslavia at San Francisco, California.  
*Respondents*

This cause on December 16, 1959, having been duly argued  
 and submitted upon and concerning all questions arising  
 upon the transcript and record and then reserved for  
 further consideration, and the Court having fully consid-

ered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of the court below rendered and entered in this cause be and the same is in all things reversed and set aside.

IT FURTHER IS ORDERED that each party pay his own costs in this Court.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to take further proceedings in conformity with the opinion of the Court herein and in accordance therewith.

STATE OF OREGON,        }  
County of Marion,       } ss:

I, F. M. SERCOMBE, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of DECREE has been by me compared with the original journal entry and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Salem, Oregon, March 2, 1900.

/s/ F. M. SERCOMBE  
Clerk of Supreme Court,  
State of Oregon

TO THE CIRCUIT COURT OF THE STATE OF OREGON,  
For the County of MULTNOMAH

You are hereby commanded that of the above judgment order of our Supreme Court you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution

thereof, as to the said order of our Supreme Court, and to law and justice shall appertain.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, MARCH 2, 1960.

/s/ F. M. SERCOMBE

*Clerk of Supreme Court,  
State of Oregon*

BE IT REMEMBERED, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem on the first Monday, the 5th day of October, 1959. WHEREUPON on this Wednesday, the 13th day of January, 1960, the same being the 28th judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice,  
George Rossman, Associate Justice,  
Hall S. Lusk, Associate Justice,  
Harold J. Warner, Associate Justice,  
William C. Perry, Associate Justice,  
Gordon W. Sloan, Associate Justice,  
Kenneth J. O'Connell, Associate Justice,  
F. M. Sercombe, Clerk,

when the following proceedings were had:

**Appeal from Multnomah County**

**In the Matter of the Estate of,  
Muharem Zekich, deceased.**

**STATE OF OREGON, acting by and through the State Land  
Board, Appellant**

**v.**

**LUTVO ZEKIC, IBRO ZEKIC, HABIBA TURKOVIC, DZEDJA POPO-  
VAC, SEFKO MURADBASIC, DIKA MURADBASIC, MURTA  
BRKIC, MILKA ZEKIC, JASMINA ZEKIC and RAJKA ZEKIC,  
and BRANKO KARDZOLE, Consul General of Yugoslavia  
at San Francisco, California, Respondents**

This cause on December 16, 1959, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration, and the Court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of the court below rendered and entered in this cause be and the same is in all things reversed and set aside.

IT FURTHER IS ORDERED that each party pay his own costs in this Court.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to take further proceedings in conformity with the opinion of the Court herein and in accordance therewith.

STATE OF OREGON,     }  
County of Marion,    } ss:

I, F. M. SERCOMBE, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of DECREE has been by me compared with the original journal entry and that it is a correct transcript therefrom, and

of the whole of such original, as the same appears of record, and in my office and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Salem, Oregon, March 2, 1960.

/s/ F. M. SERCOMBE

*Clerk of Supreme Court,  
State of Oregon*

TO THE CIRCUIT COURT OF THE STATE OF OREGON,  
~~For~~ the County of MULTNOMAH

You are hereby commanded that of the above judgment order of our Supreme Court you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Supreme Court, and to law and justice shall appertain.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, March 2, 1960.

/s/ F. M. SERCOMBE

*Clerk of Supreme Court,  
State of Oregon*

**APPENDIX C**

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

No. 71 287

IN THE MATTER OF THE ESTATE OF

JOE STOICH, DECEASED

**Order Denying Petition for Escheat and Determining  
Distribution**

This matter having come on regularly to be heard upon the Petition of the State of Oregon for Finding and Order of Escheat and upon Answer of Heirs to Petition of the State of Oregon for Finding and Order of Escheat on file herein, the Honorable James W. Crawford, Circuit Judge, presiding, this case, the estates of Muharent Zekich, deceased, No. 71 702, and Marion Beroshi, deceased, No. 71 316 of this Court, having been consolidated for hearing by stipulation of the parties because of the similarity of facts and the identity of the issues to be decided, the State of Oregon appearing by the Attorney General of Oregon by Catherine Zorn, Assistant Attorney General, the claimant heirs hereinafter named appearing through Branko Karadzole, Consul General of Yugoslavia at San Francisco, California, by Sinisa Kosutic, Consul of Yugoslavia, and Sava Temer, Consul of Yugoslavia, and by Peter A. Schwabe, their attorney, the Court having heard, received and considered the evidence submitted and having heard the arguments of counsel and the Court finding:

1. That the next of kin and heirs at law of the said Joe Stoich, deceased, hereinafter named were all at the time of his death in Portland, Oregon, on December 6, 1953, residents and nationals of the Federal People's Republic of Yugoslavia.

2. That as of the date and time of death of Joe Stoich, deceased, on December 6, 1953, there existed and now

exist in Yugoslavia reciprocal rights upon the part of citizens of the United States to take real and personal property and the proceeds thereof by will or intestacy on the same terms and conditions as inhabitants and citizens of the country of Yugoslavia; that there then existed and now exist the rights of citizens of the United States to receive payment to them within the United States or its territories of moneys originating from the estates of persons dying within the country of Yugoslavia; and further that in the country of Yugoslavia, heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from the estates of persons dying within the State of Oregon without confiscation, in whole or in part, by the government of said country of Yugoslavia; that therefore the requirements of Section 111.070 ORS have been fully met and the relatives, heirs and distributees above named are entitled to take and to receive distribution of their inheritances from the estate of Joe Stoich, deceased.

3. That the next of kin and heirs at law of the said Joe Stoich, deceased, and the shares in which they are entitled to inherit and receive distribution of the clear proceeds of his estate are as follows:

Andja Kolovrat	sister	1/5
Drago Stojic	nephew	1/15
Dragica Sunjic	niece	1/15
Neda Turk	niece	1/15

(The children and all of the issue of a predeceased brother Mijo Stojic).

Josip Buljan	nephew	1/5
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(Only son and issue of a predeceased sister Joka Buljan, nee Stojic).

Jure Zivanovic	nephew	1/5
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(Only son and issue of a predeceased sister Mitija Zivanovic, nee Stojic).

Mara Tolie	niece	1/10
Milan Stojic	nephew	1/10

(The children and all of the issue of a  
predeceased brother Ivan Stojic).

residing at Prolozac, District of Imotski;  
Republic of Croatia, Yugoslavia.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND  
DECREED:

1. That the Petition of the State of Oregon for Finding  
and Order of Escheat filed herein by the State of Oregon,  
acting by and through the State Land Board, be and the  
same is hereby denied and dismissed.

2. That the next of kin and heirs at law of the said  
Joe Stoich are the sister, nieces and nephews hereinabove  
named, and that they are entitled to distribution of the  
clear distributable proceeds of this estate in the portions  
and fractions hereinabove set forth.

3. That upon the completion of the administration of this  
estate and the final settlement thereof distribution be  
made to and among the said next of kin and heirs at law  
of Joe Stoich, deceased, as hereinabove set forth.

Dated at Portland, Oregon, this 26th day of April, 1957.

/s/ JAMES W. CRAWFORD  
Circuit Judge

Approved as to form:

/s/ CATHERINE ZORN  
Assistant Attorney General  
of Oregon

This day continued in Probate Court Journal number  
Seven hundred and Eighty Nine. (789)

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

No. 71 702

In the Matter of the Estate of

MUHAREM ZEKICH, Deceased

**Order Denying Petition for Escheat and Determining  
Distribution**

This matter having come on regularly to be heard upon the Petition of the State of Oregon for Finding and Order of Escheat and upon Answer of Heirs, to Petition of the State of Oregon for Finding and Order of Escheat on file herein, the Honorable James W. Crawford, Circuit Judge, presiding, this case, the estates of Joe Stoich, deceased, No. 71 287 and Marion Berosh, deceased, No. 71 316 of this Court, having been consolidated for hearing by stipulation of the parties because of the similarity of facts and identity of the issues to be decided, the State of Oregon appearing by the Attorney General of Oregon by Catherine Zorn, Assistant Attorney General, the claimant heirs hereinafter named appearing through Branko Karadzole, Consul General of Yugoslavia at San Francisco, California, by Sinisa Kosutic, Consul of Yugoslavia, and Sava Temer, Consul of Yugoslavia, and by Peter A. Schwabe; their attorney, the Court having heard, received and considered the evidence submitted and having heard the arguments of counsel and the Court finding:

1. That the next of kin and heirs at law of the said Muharem Zekich, deceased, hereinafter named were all at the time of his death in Portland, Oregon, on December 17, 1953, residents and nationals of the Federal People's Republic of Yugoslavia.

2. That as of the date and time of death of said Muharem Zekich, deceased, on December 17, 1953, there existed and now exist in Yugoslavia reciprocal rights upon the part

of citizens of the United States to take real and personal property and the proceeds thereof by will or intestacy on the same terms and conditions as inhabitants and citizens of the country of Yugoslavia; that there then existed and now exist the rights of citizens of the United States to receive payment to them within the United States or its territories of moneys originating from the estates of persons dying within the country of Yugoslavia; and further that in the country of Yugoslavia, heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from the estates of persons dying within the State of Oregon without confiscation, in whole or in part, by the government of said country of Yugoslavia; that therefore the requirements of Section 111.070 ORS have been fully met and the relatives, heirs and distributees above named are entitled to take and to receive distribution of their inheritances from the estate of Muharem Zekich, deceased.

3. That the next of kin and heirs at law of the said Muharem Zekich, deceased, and the shares in which they are entitled to inherit and receive distribution of the clear proceeds of his estate are as follows:

Lutvo Zekic	brother	1/7
Ibro Zekic	brother	1/7
Habiba Turkovic	sister	1/7
Dzedja Popovac	sister	1/7
Sefko Muradbasic	nephew	1/14
Dika Muradbasic	niece	1/14

(Children and all the issue of Djuka Muradbasic, a predeceased sister)

Murta Brkic	niece	1/7
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(Child and all the issue of Nadjla Mehmedbasic, a predeceased sister)

Milka Zekic	niece	1/21
Jasmina Zekic	niece	1/21
Rajka Zekic	niece	1/21

(Children and all the issue of Safet Zekic,  
a predeceased brother)

residing at Stolac, Republic of Bosnia  
and Hercegovina, Yugoslavia

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND  
DECREED:

1. That the Petition of the State of Oregon for Finding  
and Order of Escheat filed herein by the State of Oregon,  
acting by and through the State Land Board, be and the  
same is hereby denied and dismissed.

2. That the next of kin and heirs at law of the said  
Muharem Zekich are the brothers, sisters, nieces and  
nephews hereinabove named, and that they are entitled to  
distribution of the clear distributable proceeds of this  
estate in the portions and fractions hereinabove set forth.

3. That upon the completion of the administration of this  
estate and the final settlement thereof distribution be made  
to and among the said next of kin and heirs at law of  
Muharem Zekich, deceased, as hereinabove set forth.

Dated at Portland, Oregon, this 26 day of April, 1957.

/s/ JAMES W. CRAWFORD  
Circuit Judge

Approved as to form:

/s/ CATHERINE ZORN  
Assistant Attorney General  
of Oregon

## APPENDIX D CONVENTION

BETWEEN

THE UNITED STATES OF AMERICA AND SERBIA,  
FOR FACILITATING AND DEVELOPING COMMERCIAL RELATIONS.

By the President of the United States of America.

### A PROCLAMATION.

Whereas, a Treaty between the United States of America and His Highness the Prince of Serbia, for facilitating and developing the commercial relations established between the two countries, was concluded and signed at Belgrade by their respective plenipotentiaries on the 2/14 day of October, 1881, the original of which treaty, being in the English and Serbian languages, is word for word as follows:

#### TREATY OF COMMERCE BETWEEN THE UNITED STATES OF AMERICA AND SERBIA.

The United States of America and His Highness the Prince of Serbia, animated by the desire of facilitating and developing the commercial relations established between the two countries, have determined with this object to conclude a treaty, and have named . . . their respective plenipotentiaries . . .

Who . . . have agreed upon and concluded the following articles:

#### ARTICLE II.

In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects

in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.

Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state.

### ARTICLE III.

Merchants, manufacturers, and trades people in general of one of the two contracting countries traveling in the other, or sending thither their clerks and agents—whether with or without samples—in the exclusive interest of the commerce or industry that they carry on, and for the purpose of making purchases or sales or receiving commissions, shall be treated with regard to their licenses, as the merchants, manufacturers and trades people of the most favored nation. \* \* \*

### ARTICLE IV.

Citizens of the United States in Serbia and Serbian subjects in the United States shall be reciprocally exempted from all personal service, whether in the army by land or by sea; whether in the national guard or militia; from billeting; from all contributions, whether pecuniary or in kind, destined as a compensation for personal service; from all forced loans, and from all military exactions or

requisitions. The liabilities, however, arising out of the possession of real property and for military loans and requisitions to which all the natives might be called upon to contribute as proprietors of real property or as farmers, shall be excepted.

They shall be equally exempted from all obligatory official, judicial, administrative or municipal functions whatever.

They shall have reciprocally free access to the courts of justice or conforming to the laws of the country, both for the prosecution and for the defence of their rights in all the degrees of jurisdiction established by the laws. They can employ in every case advocates, lawyers and agents of all classes authorized by the law of the country, and shall enjoy in this respect, and as concerns domiciliary visits to their houses, manufactories, warehouses or shops, the same rights and advantages as are or shall be granted to the natives of the country, or to the subjects of the most favored nation. \* \* \*

#### ARTICLE VII.

The products of the soil or of the industry of Serbia which shall be imported into the United States of America, and the products of the soil or of the industry of the United States which shall be imported into Serbia, and which shall be destined for consumption in the country, for warehousing, for re-exportation or for transit, shall be subjected to the same treatment, and shall not be liable to other or higher duties than the products of the most favored nation.

EUGENE SCHUYLER

CH. MIJATOVICH

And whereas the said treaty has been duly ratified on both parts, and the respective ratifications were exchanged at Belgrade on the 15th ultimo:

Now, therefore, I, Chester A. Arthur, President of the United States of America, have caused the said treaty to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof. \* \* \*

Done \* \* \* this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and eighty-two.

CHESTER A. ARTHUR.

By the President:

FRED'K T. FRELINGHUYSEN,  
*Secretary of State.*

## APPENDIX E

## INTERNATIONAL MONETARY FUND AGREEMENT

## Article IV. Par Values of Currencies

SECTION 1. *Expression of par values.* \* \* \*SEC. 2. *Gold purchases based on par values.* \* \* \*SEC. 3. *Foreign exchange dealings based on parity.*—

The maximum and the minimum rates for exchange transactions between the currencies of members taking place within their territories shall not differ from parity.

- (i) in the case of spot exchange transactions, by more than one percent; and
- (ii) in the case of other exchange transactions, by a margin which exceeds the margin for spot exchange transactions by more than the Fund considers reasonable.

SEC. 4. *Obligations regarding exchange stability.*—(a) Each member undertakes to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations.

(b) Each member undertakes, through appropriate measures consistent with this Agreement, to permit within its territories exchange transactions between its currency and the currencies of other members only within the limits prescribed under Section 3 of this Article. \* \* \*

## Article VI. Capital Transfers

SECTION 1. *Use of the Fund's resources for capital transfers.*—(a) A member may not make net use of the Fund's resources to meet a large or sustained outflow of capital, and the Fund may request a member to exercise controls to prevent such use of the resources of the Fund. If, after receiving such a request, a member fails to exercise appropriate controls, the Fund may declare the member ineligible to use the resources of the Fund.

SEC. 2. *Special provisions for capital transfers.* \* \* \*

SEC. 3. *Controls of capital transfers.*—Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3 (b), and in Article XIV, Section 2.

#### Article VII. Scarce Currencies

SECTION 1. *General scarcity of currency.*—If the Fund finds that a general scarcity of a particular currency is developing, the Fund may so inform members and may issue a report setting forth the causes of the scarcity and containing recommendations designed to bring it to an end. A representative of the member whose currency is involved shall participate in the preparation of the report.

SEC. 2. *Measures to replenish the Fund's holdings of scarce currencies.* \* \* \*

SEC. 3. *Scarcity of the Fund's holdings.*—(a) If it becomes evident to the Fund that the demand for a member's currency seriously threatens the Fund's ability to supply that currency, the Fund, whether or not it has issued a report under Section 1 of this Article, shall formally declare such currency scarce and shall thenceforth apportion its existing and accruing supply of the scarce currency with due regard to the relative needs of members, the general international economic situation, and any other pertinent considerations. The Fund shall also issue a report concerning its action.

(b) A formal declaration under (a) above shall operate as an authorization to any member, after consultation with the Fund, temporarily to impose limitations on the freedom of exchange operations in the scarce currency. Subject to the provisions of Article IV, Sections 3 and 4.

the member shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by, or accruing to, the member in question; and they shall be relaxed and removed as rapidly as conditions permit.

### **Article VIII. General Obligations of Members**

**SECTION 1. Introduction.**—In addition to the obligations assumed under other articles of this Agreement, each member undertakes the obligations set out in this Article.

**SEC. 2. Avoidance of restrictions on current payments.**—

(a) Subject to the provisions of Article VII, Section 3 (b), and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

### **Article XIV. Transitional Period**

**SECTION 1. Introduction.**—The Fund is not intended to provide facilities for relief or reconstruction or to deal with international indebtedness arising out of the war.

**SEC. 2. Exchange restrictions.**—In the post-war transitional period members may, notwithstanding the provisions of any other articles of this Agreement, maintain

and adapt to changing circumstances (and, in the case of members whose territories have been occupied by the enemy, introduce where necessary) restrictions on payments and transfers for current international transactions. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the Fund; and, as soon as conditions permit, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability. In particular, members shall withdraw restrictions maintained or imposed under this Section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the resources of the Fund.

*SEC. 3. Notification to the Fund. \* \* \**

*SEC. 4. Action of the Fund relating to restrictions.*—Not later than three years after the date on which the Fund begins operations and in each year thereafter, the Fund shall report on the restrictions still in force under Section 2 of this Article. Five years after the date on which the Fund begins operations, and in each year thereafter, any member still retaining any restrictions inconsistent with Article VIII, Sections 2, 3, or 4, shall consult the Fund as to their further retention. The Fund may, if it deems such action necessary in exceptional circumstances, make representations to any member that conditions are favorable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with the provisions of any other article of this Agreement. The member shall be given a suitable time to reply to such representations. If the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XV, Section 2 (a).

*SEC. 5. Nature of transitional period.*—In its relations with members, the Fund shall recognize that the post-

war transitional period will be one of change and adjustment and in making decisions on requests occasioned thereby which are presented by any member it shall give the member the benefit of any reasonable doubt.

### **Article XV. Withdrawal from Membership**

#### **SECTION 1. *Right of members to withdraw.* \* \* \***

**SEC. 2. *Compulsory withdrawal.***— (a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund. \* \* \*

(b) If, after the expiration of a reasonable period the member persists in its failure to fulfill any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the governors representing a majority of the total voting power.

### **Article XIX. Explanation of Terms**

In interpreting the provisions of this Agreement the Fund and its members shall be guided by the following:

(i) Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:

- (1) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
- (2) Payments due as interest on loans and as net income from other investments;
- (3) Payments of moderate amount for amortization of loans or for depreciation of direct investments;
- (4) Moderate remittances for family living expenses.

The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions.

**APPENDIX F****Oregon Revised Statutes  
Section 111.070**

(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property.

**APPENDIX G**

The Secretary of State presents his compliments to the Charge d'Affaires ad interim of the Federal People's Republic of Yugoslavia and acknowledges the receipt of the Embassy's note No. 4298 of April 18, 1958, regarding the interpretation of Article II of the Convention for Facilitating and Developing Commercial Relations (sometimes called the Convention of Commerce and Navigation), concluded on October 2 14, 1881 between the United States of America and Serbia, and presently in force between the United States of America and Yugoslavia. (22 Statutes at Large 963, Treaty Series 319.)

According to the Embassy's note, the Government of Yugoslavia considers that, by virtue of Article II of the 1881 Convention, citizens of the United States are entitled to most-favored nation treatment with respect to the acquisition, possession, or disposition of property in Yugoslavia whether they reside in Yugoslavia or elsewhere and, in the case of inheritance, regardless of the decedent's nationality. With particular reference to inheritance, the Embassy states that, in accordance with this construction of Article II of the 1881 Convention, United States citizens, regardless of their residence or of the decedent's nationality, are entitled to and do actually enjoy the same rights as Yugoslav nationals with respect to the inheritance of property in Yugoslavia. This, as the note points out, is in consequence of the fact that United States citizens, wherever resident, are accorded in Yugoslavia treatment no less favorable than that accorded in Yugoslavia to nationals of Poland under Article 23 of the Treaty Regarding Legal Relations concluded on May 4, 1923 between Yugoslavia and Poland, whereby Polish nationals, irrespective of their residence, are accorded national treatment (that is, the same treatment as Yugoslav nationals) in regard to the succession to and possession of property in Yugoslavia.

The Embassy's note cites Article IX of the Treaty of Friendship, Commerce, and Navigation of July 27, 1853 between the United States of America and Argentina, which contains a national-treatment provision similar in substance to the provision in Article 23 of the 1923 treaty between Yugoslavia and Poland. The note indicates that, by the application of such provision together with the most favored-nation provision in Article II of the 1881 Convention, Yugoslav nationals are entitled to and should be accorded, whether they reside in the United States or elsewhere and regardless of the decedent's nationality, the right to acquire, possess, or dispose of property in the United States.

The Embassy's note further states that the Yugoslav Government, pursuant to the third paragraph of Article II of the 1881 Convention, accords to American citizens, wherever they reside, the right to withdraw and have transferred to them moneys due them by inheritance from decedents' estates located in Yugoslavia or moneys derived from the sale of inherited property in Yugoslavia.

The Embassy's note called attention to the agreement of July 19, 1948 between the United States of America and Yugoslavia regarding the settlement of pecuniary claims against Yugoslavia, and particularly to Article 5 of that agreement which has the effect of confirming that Article II of the 1881 Convention is interpreted as according rights in regard to property in one or the other of the two countries irrespective of the place of residence of the nationals concerned or of the decedent's nationality.

The Embassy's note inquired whether the United States Government concurs with the Yugoslav Government's interpretation of Article II of the 1881 Convention, particularly as applied to the rights of Yugoslav nationals who do not reside in the United States. It appears that the Embassy's inquiry is prompted by indications that some State attorneys general in the United States are tending

toward the adoption of a contrary view. The note refers to a statement by the Supreme Court of California in the case of *In re Arbulich's Estate*, 41 Cal. 2d 86, 257 P. 2d 433, certiorari denied, 346 U.S. 897 (1953).

It is well to bear in mind a general principle applied in the United States, namely, that although an expression of opinion by the Department of State with respect to the interpretation of a treaty provision will normally be given considerable weight by the courts, such an expression of opinion is not binding on the courts.

The Department of State concurs in the Yugoslav interpretation of Article II of the 1881 Convention. That is to say, it is the opinion of the Department that Article II provides that whatever right is accorded in this country to nationals of any third country, wherever resident, with respect to the acquisition, possession, or disposition of property (including the rights of inheritance and transfer of proceeds thereof), shall be accorded likewise in this country to Yugoslav nationals wherever resident and irrespective of the decedent's nationality. The Embassy's citation of the 1853 treaty between the United States of America and Argentina in connection with this matter appears to be appropriate.

Article II of the 1881 Convention is quoted in the Embassy's note, so it will not be set forth here. The critical words "citizens of the United States in Serbia and Serbian subjects in the United States shall enjoy [certain rights]" as they appear in the first paragraph of Article II may be given at least two plausible interpretations, namely: (1) The words "in Serbia" and "in the United States" may be deemed adjectival, modifying respectively "citizens of the United States" and "Serbian subjects". (2) The words "in Serbia" and "in the United States" may be deemed adverbial, modifying "shall enjoy". The first of these interpretations would limit the application of the article to the rights of nationals of the one country present

in the other. However, a literal reading of the pertinent phraseology in context does not require such a restrictive interpretation. Rather, a liberal interpretation of the ambiguous portion produces a reasonable construction consonant with the spirit of the Treaty as a whole.

Under the first, or restrictive interpretation, an American citizen residing in Yugoslavia would be accorded under the most-favored-nation provision whatever rights in respect of the acquisition, possession, or disposition of property in Yugoslavia were accorded to nationals of a third country (for example, Poland under the 1923 treaty which the note cites) who were resident therein. However, American citizens outside Yugoslavia would not be accorded rights similar to rights under Yugoslav law enjoyed by Polish nationals who were not resident therein.

A review of the negotiating history of the 1881 Convention discloses nothing which supports the theory that the Governments of the United States and Serbia intended to provide that only some and not all of the nationals of the respective countries would be entitled to most-favored-nation treatment with respect to the acquisition, possession, and disposition of property. In this connection, it appears to have been the consistent policy of the United States, as reflected in treaties concluded between 1850 and 1890, to accord rights of inheritance and succession to property to nationals of the other contracting party without regard to their residence at the time of the decedent's death.

As stated in the preamble thereto, the 1881 Convention was entered into for the purpose of "facilitating and developing the commercial relations established between the two countries". The restrictive view would probably produce results inconsistent with this purpose. For example, a national of one country, also resident therein, wishing to make an *inter vivos* disposition of property belonging to him and located in the other country would have been required to make the long and then arduous trip

to the other country to effect the disposition. It seems equally inconsistent with the expressed purpose of the Convention to make an alien's rights of inheritance turn on his location at the time of decedent's death.

Therefore, in the absence of clear and unmistakable evidence of a contrary intention on the part of the negotiators, it appears that the interpretation most consistent with the purpose of the Convention, and with the policy reflected in treaties between the United States of America and other countries, is to interpret the words "in Serbia" and "in the United States" as referring to the place where property rights are granted rather than to the geographical location of the person claiming such rights. As thus construed, the provision would accord to nationals of either party *wherever resident* rights similar to those enjoyed by nationals of the most-favored-nation *wherever resident*. A review of all relevant correspondence available at the National Archives indicates no intention contrary to this interpretation. As the Supreme Court has said:

"Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U.S. 483, 487; *Geofroy v. Riggs*, *supra*, 271; *Tucker v. Alexandroff*, 183 U.S. 424, 437." *Asakura v. Seattle*, 265 U.S. 332, 342 (1924).

This note, of course, is not to be considered as having the character of an international agreement or as effecting any modification of the treaty.

Department of State,

Washington, April 24, 1958.

211.683 4-1858

No. 4298

The Ambassador of the Federal People's Republic of Yugoslavia presents his compliments to the Honorable the Secretary of State and, in accordance with talks held between representatives of the Yugoslav Embassy and representatives of the Department of State, has the honor to inform the Honorable the Secretary of State that in the United States there have in the post-war period been various interpretations of Article II of the "Convention for Facilitating and Developing Commercial Relations" concluded between Serbia and the United States on October 2/14, 1881, (also commonly called the Convention of Commerce and Navigation of 1881, Treaty Series 319, 22 Stat. 936, 2 Malloy's Treaties, ect. [sic] 1613). The governments of the Federal People's Republic of Yugoslavia and of the United States of America recognize that this Convention has at all times been and is now in force between Yugoslavia and the United States. Article II of the Convention reads in the English text as follows:

"In all that concerns the right of acquiring, or possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian Subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favoured nation."

"Within these limits, and under the same conditions as the subjects of the most favoured nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage, contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favoured nation."

"They shall likewise be at liberty to export freely the proceeds of the sale of their property and their goods in general, without being subjected to pay any

other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favoured state."

In the period since 1945 there have been cases in which Article II of the Convention of Commerce and Navigation of 1881, when applied in the United States, was interpreted as if it did not sufficiently bear out reciprocal rights of inheritance between the citizens of the Federal People's Republic of Yugoslavia and the citizens of the United States of America. According to the interpretations (particularly a statement by the Supreme Court of California in the case *In re Arbulich Estate*, 41 Cal. 2d 86, 257 P. 2d 433 and statements of some State attorneys general), the provisions of the Convention allegedly cannot be applied to those decedents' estates, the decedent of which is an American citizen who has left property in the United States to a Yugoslav citizen residing in Yugoslavia. According to such an interpretation, the acquisition of property by inheritance, pursuant to the provision of the most-favoured-nation clause in Article II of the Convention, encompasses only those citizens of Yugoslavia actually and physically living, sojourning or residing within the borders of the United States regardless of the decedent's citizenship. On the other hand, according to such an interpretation, the Yugoslav citizens permanently residing within the borders of Yugoslavia cannot inherit property left them by a resident of the United States, although the heirs are in most cases the closest relatives of the decedent's—his parents, spouse, children, brothers, sisters, etc. And vice versa, the corresponding should, then, apply as regards the inheritance rights of American citizens in Yugoslavia.

Such an interpretation, however, is directly contrary to the past and present interpretation of the Yugoslav courts and authorities, who always have been applying the provisions of Article II of the Convention so that by

virtue thereof the American citizens are entitled to acquire property by inheritance, testamentary disposition or intestate succession, or by transfer, regardless of whether they are permanently residing in the United States of America, or anywhere else, as well as regardless of whether the decedent is a citizen of Yugoslavia, the United States or any third country. This can be clearly deduced from many a decision of the Yugoslav courts, who have been applying and interpreting Article II of the Convention exclusively in the above sense.

In Article 23 of the Convention of Legal Relations between Yugoslavia and Poland, concluded on May 4, 1923, (85 League of Nations Treaty Series 455) the two contracting parties extended rights of inheritance to the nationals of the other as follows:

“The nationals of either Contracting Party shall be allowed, on the same conditions as nationals of the country to succeed or to take possession of property passing to them in the territory of the other Contracting Party by operation of law or in virtue of testamentary disposition.”

It is the construction of the Yugoslav Government, that under the most-favoured-nation clause of Article II of the Convention of 1881 citizens of the United States regardless of their whereabouts or residence have had extended to them and are entitled to enjoy the same rights of inheritance from decedents' estates and of property located in Yugoslavia as nationals of Yugoslavia themselves, and regardless of whether the decedent was a citizen of Yugoslavia, the United States of America or any third country.

As regards the application of the most-favoured-nation clause to the rights of the Yugoslav citizens, regardless of their permanent residence, to acquire property and to inherit estates in the United States, it is clearly explained, for example, by Article IX of the Treaty of Friendship, Commerce and Navigation between the United States and

Argentina, signed at San Jose on July 27, 1853 (10 Stat. Pt. 2, Public Treaties/ 16 Treaty Series 4, I Treaties Malloy/ 20):

"In whatever relates to the police of the ports, the lading and unlading of ships, the safety of the merchandise, goods and effects, and to the acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament or in any other manner whatsoever, as also to the administration of justice, the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights, as native citizens: and they shall not be charged, in any of those respects, with any higher imposts or duties than those which are paid or may be paid, by native citizens, submitting, of course, to the local laws and regulations of each country respectively. If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-General or Consul of the nation to which the deceased belonged, or the representative of such Consul-General or Consul, in the absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

This treaty unequivocally grants Argentine citizens the same rights of inheritance as native citizens in the United States, in the same manner as the right is granted to the Yugoslav citizens by the treaty between Poland and Yugoslavia. It will be observed that in substance the 1853 treaty with Argentina is very similar to the 1923 treaty between Poland and Yugoslavia.

It is further the construction of the Yugoslav Government that by virtue of the most-favoured-nation clause and the third [sic] subparagraph of Article II of the Convention of 1881, American citizens, wherever they may physically be or permanently reside, have and must be accorded the right to withdraw and export, i.e. have transferred to them

upon request to the United States or wherever they may direct, moneys due them by inheritance from decedents' estates located in Yugoslavia or moneys derived from the sale of inherited property in Yugoslavia.

The interpretation of the Yugoslav Government is also based on the spirit and intentions stated in the preamble to the Convention of Commerce and Navigation of 1881, as well as on the basis of the needs resulting from the relations which prevailed at that time between the two countries.

It is apparent, therefore, that the construction of the treaty adopted by the Supreme Court of California in *Re Arbulich Estate* is not in accord with the understanding of the Yugoslav Government concerning the meaning and the effect of Article II of the Convention of 1881. This construction requires that there be twice read into the language the word "residing" or at least the word "sojourning" so the clause could read "citizens of the United States residing (or sojourning) in Serbia and Serbian citizens residing (or sojourning) in the United States". It requires no addition of words in the treaty to rephrase from Victorian into modern English what was beyond doubt the intention of the treaty-makers as to the persons to be covered by the treaty.

Article 5 of the "Agreement Between the Government of the United States of America and the Federal People's Republic of Yugoslavia Regarding Pecuniary Claims of the United States and its Citizens", concluded on July 12, 1948, (Treaty Series No. 1803, 62 Stat. 2133) provides as follows:

"The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the right and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favourable than the rights and privileges accorded to nationals

of Yugoslavia or of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2/14, 1881."

It is evident that both Parties have confirmed thereby that Article II of the Convention of 1881 is to be interpreted to the effect that the citizens of one contracting party shall have the most-favoured-nation treatment when acquiring property in the territory of the other, regardless of the heir's residence or the decedent's citizenship. This joint interpretation (reached by both contracting parties) confirms the already reached concurrence on the existence of the rights of American citizens in Yugoslavia (and accordingly of the Yugoslav citizens in the United States of America) to acquire property (and accordingly to inherit) by virtue of Article II of the Convention of 1881, regardless of the heir's residence and the decedent's citizenship.

The Commission for Interpreting of Laws of the National Assembly of the Federal People's Republic of Yugoslavia issued on August 3, 1955, and the National Assembly subsequently confirmed, a binding interpretation, as follows:

"According to Article 5 of the Agreement between the Government of the United States of America and the Federal People's Republic of Yugoslavia regarding Pecuniary Claims of the United States of America and its Citizens, concluded on July 19, 1948, and the provisions of Article II of the Convention of Commerce and Navigation between Serbia and the United States of America, concluded on October 2/14, 1881, which is still in force, citizens of the United States of America are equal with citizens of the Federal People's Republic of Yugoslavia in regard to the manner and object of acquiring and disposing of both personal and real property. Accordingly, they have the right to inherit real property in the territory of the Federal People's Republic of Yugoslavia under the same conditions as citizens of the Federal People's Republic of Yugoslavia on the basis of the Law, as

well as on the basis of a Testament, regardless of the provision of Article 5, paragraph 1 of the Decree regarding the Control of Transfers of Real Property, of March 20, 1948."

In the note of the Secretariat of State for Foreign Affairs of Yugoslavia No. 515370/53 of October 21, 1953, to the American Embassy in Belgrade, in response to the American Embassy's note No. 1368 of May 21, 1953, unqualified assurances were given by the Yugoslav Government that it considers citizens of the United States, regardless of their whereabouts or residence, to have full reciprocal rights of inheritance in decedents' estates located in Yugoslavia on the basis of Article II of the Convention between Serbia and the United States of 1881, as confirmed by Article 5 of the Agreement on Pecuniary Claims of the United States and its Citizens, concluded on July 19, 1948.

The Attorneys General of both Oregon and California, which enacted the so-called reciprocal inheritance rights statutes in the years 1937 and 1941 respectively, issued opinions that reciprocal inheritance rights existed between Yugoslavia and the United States in the manner required by their statutes by virtue of Article II of the Convention between Serbia and the United States of 1881. The opinion of the Honorable I. H. Van Winkle, Attorney General of Oregon, is in the 1938-1940 volume of the Opinions of the Attorneys General at page 136, that of the Honorable Earl Warren, Attorney General of California, is No. 1 NS 4451 dated July 15, 1942, from which the following is quoted:

"Class 2. Where the same or reciprocal rights in the matter of acquiring and holding all kinds of property in any manner whatsoever are not granted to the citizens of the respective parties to the treaty in those specific words, but are in effect so granted by conferring such rights upon those citizens which the respective laws grant or shall grant in each of the states to the subjects of the most-favoured-nation, and under the same conditions as the subjects of the most-favoured-nation."

"In the class is Yugoslavia (the Treaty applying also to Serbia and the Kingdom of the Serbs, Croats and Slovenes) the citizens of which are entitled, by virtue of the reference provisions of such Treaty, to the same rights as those enjoyed by the citizens of Argentina."

In substantiation of the fact that Yugoslavia has always meticulously performed and carried out the obligations which, under its construction of the Convention, are due American citizens heirs or beneficiaries of estates and property in Yugoslavia, reference may be made to the Department's note of December 26, 1957, in response to this Embassy's note of November 4, 1957, No. 4693, wherein the Department stated:

"In the light of the foregoing, the Embassy is informed that the Department has not been apprised of any instance where an American citizen has not been permitted to inherit or succeed by will or otherwise to property from an estate in Yugoslavia, or, after having duly made application therefor, has not been granted permission to transfer his inheritance of the proceeds of sale thereof to the United States in dollars."

In view of the foregoing, the Government of the Federal People's Republic of Yugoslavia would appreciate being advised of the opinion of the Government of the United States on the following:

Whether it concurs with the construction of the Yugoslav Government that it was the treaty-making intention of both contracting parties in negotiating and concluding Article II of the Convention for Facilitating and Developing Commercial Relations of 1881 and Article 5 of the Agreement between the Government of the United States of America and the Federal People's Republic of Yugoslavia regarding Pecuniary Claims of the United States and its Citizens of 1948 to safeguard the inheritance rights of American citizens and to ensure the transfer of the

proceeds accruing thereof, regardless of their permanent residence, encompassing therefore also those American citizens residing in the United States, and reversely, whether it concurs with the construction of the Yugoslav Government that it was the treaty-making intention of both contracting parties in negotiating and concluding Article II of the Convention of 1881 and Article 5 of the Agreement of 1948, to safeguard the inheritance rights of Yugoslav citizens and to ensure the transfer of the proceeds accruing thereof, regardless of their permanent residence, encompassing therefore also those residing in Yugoslavia!

The Yugoslav Ambassador avails himself of this opportunity to renew to the Honorable the Secretary of State the assurances of his highest consideration.

Washington, D. C., April 18, 1958.

**APPENDIX H**

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 366-848

DIVISION "C"

Docket 1

**SUCCESSION OF STEVE VLAHO****Reasons for Judgment**

The two primary issues here are: (1) Whether testator was compos mentis when he wrote his last will and testament in the olographic form; and, (2) Whether reciprocal rights of inheritance exist in Yugoslavia and America, which permit the citizens of the one to inherit property in the other.

Plaintiff, a citizen of Louisiana and a collateral relative of testator, would inherit in the event of intestacy and want of reciprocity. Intervenor's are the testamentary heirs; are citizens of Yugoslavia, and are brothers and sisters of testator.

Regarding testamentary capacity, plaintiff's witnesses devoted their testimony to happenings in 1936, twenty-one years before testator made his last will. While testator was committed to the East Louisiana Mental Hospital in 1936, he was never confined there. Plaintiff himself testified that, from 1936 to his death, testator was employed in New Orleans, and always knew his whereabouts and acquaintances.

Stock brokers, who saw him almost daily, testified that testator at all times knew his friends; his affairs; was well acquainted with the operation of the stock market; was in full possession of his faculties to the date of his death; and often consulted them about stock purchases.

By self-denial and sacrifice, testator had for years worked, saved, invested and managed his estate until it reached over \$60,000.00; which was accumulated in small

amounts, methodically and carefully; all despite his foreign birth and limited education.

Testamentary capacity is always presumed. Succession of Mithoff, 168 La. 624, 122 So. 886. Every person is presumed to be of sound mind and such presumption continues until overcome by convincing evidence, likened to that required in criminal cases to overcome the presumption of innocence. Succession of Mithoff, *supra*. Anyone attacking a will must show the testator's lack of capacity *when the will was executed*. Succession of Heinemann, 136 So. 51, 172 La. 1057 (1931); Succession of Brugier, 83 So. 366, 146 La. 29 (1919).

While testator was committed in 1936, he neither entered a hospital nor was interdicted. Commitment to an insane asylum produces none of the effects of a formal interdiction; it is a mere matter of police regulation. Succession of Connor, 165 La. 890, 116 So. 223 (1928) (where a valid will was executed in the asylum).

Plaintiff lays stress on the fact that testator erroneously designated the relationship of some of his legatees. In *Wileox vs. City of Hammond*, 163 La. 489, 112 So. 373 (1927), the Supreme Court rejected a similar argument that the testatrix's failure to provide for a person in whom she had shown affection showed evidence of incapacity. Therefore, the plea of non compos mentis is not sustained and is rejected.

Regarding the issue of Reciprocity, testator left his estate to his brothers and sisters, his legal heirs. In the Succession of Herdman, 154 La. 477, 97 So. 664, Herdman left his estate to his wife and children, in Odessa, Russia. The State attacked the legacies, contending there was no treaty between the United States and Russia that would entitle citizens or residents of Russia to inherit property in Louisiana \* \* \* [sic], and that since 1911, citizens of Russia could not inherit from residents of the United States or Louisiana; and urged the application of Article 1490, La.

Revised Civil Code, which reads: "Donations inter vivos and mortis causa may be made in favor of a *stranger* when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this state."

Our Supreme Court held that Article 1490 had no application to that case because forced or legal heirs cannot be "*strangers*", either in fact or in law.

Accordingly, the codal article invoked by plaintiff here can have no application, since the legatees are testator's legal heirs, not "*strangers*."

Plaintiff relies on the decision of the California courts, "In Re Arbulich Estate", 257 Pac. (2d) 433, holding there was no reciprocity between Yugoslavia and America.

The California statute declares that the burden shall be upon such non-resident aliens to establish the existence of reciprocal rights, while our Civil Code has no such provision. The Arbulich case held that the foreign heirs had not sustained the burden of proving reciprocity and, because of a lack of proof, a divided court held against the foreign heirs.

Dr. Milan Bulajic, a graduate of the University of Belgrade, with the degree of Doctor of Laws, and the accredited diplomatic representative of Yugoslavia to the United States, testified for intervenors. His testimony establishes the following:

California courts no longer follow the Arbulich decision, and on many occasions since have ordered the distribution of California estates to heirs residing in Yugoslavia.

The Superior Court, Los Angeles, California, In the Matter of the Estate of Mitchell Miloglav, No. 301-394, reviewed the Arbulich decision, refused to follow it and commented as follows:

"In the case before this Court evidence has been introduced in an effort to prove that whatever was

established in the Arbulich case, the Yugoslav Foreign Exchange Law does not, either in fact or in effect, modify the reciprocity of inheritance which, it is conceded, otherwise exists. After carefully considering the evidence produced and the arguments presented, this Court concurs with this position.

"The attorney for the administrator will prepare findings and order approving first and final account and for distribution as prayed, finding that reciprocity exists with Yugoslavia."

In the Matter of the Estate of Victor Jursee, 132-542, Superior Court, San Francisco, California, refused to follow the Arbulich decision, with reasons as follows:

"That the reciprocity required by Section 259 of the Probate Code of the State of California exists as to the Federal People's Republic of Yugoslavia and did exist on August 13, 1954, the date upon which said deceased, Victor Jursee, died; and,

"By virtue of the decision and foreign exchange law of Yugoslavia citizens of the United States of America had on the said date of death of said deceased and continue to have an enforceable right to procure the transmittal from Yugoslavia to the United States of America of funds devolving from their inheritance from decedent's estates in Yugoslavia."

In the Matter of the Estate of Steve Gerovich, Deceased, No. 47073, the Superior Court, San Francisco, California, held that reciprocity did, in fact, exist between Yugoslavia and the United States as is set forth in the Jursee case quoted above.

Recently, the Supreme Court of Montana passed upon the same question posed in the Arbulich case. In Re Spoya's Estate, 282 Pac. 2(d) 452, it held that reciprocity did exist in fact and in law between Yugoslavia and the United States,

"There was ample evidence, without the exhibits complained of, to prove reciprocity and were we to say that

some of such exhibits were inadmissible, still we would have to say, that the rulings were harmless and reciprocity was amply proven to make out a prima facie case to sustain such rulings; there was no evidence to the contrary."

The Supreme Court of Montana in the case of *In Re Ginn's Estate*, 347 Pac. 2(d) 467 (decided November 27, 1959), rehearing denied December 29, 1959), again held that reciprocity both in fact and in law did exist between Yugoslavia and the United States, as follows:

"An examination of the record and exhibits in this cause, together with the opinion of this Court *In Re Spoya's Estate*, 129 Montana 83, 282 Pac. 2(d) 452, convinces us that the petitioner established proof of reciprocity, as required by our law, by substantial, credible and sufficient evidence."

Both Montana decisions are important because the Montana statute is similar to the California statute, in that the burden is upon the foreign heirs to establish factually that reciprocity exists between Yugoslavia and the United States. With the burden shifted to the foreign heirs, the Supreme Court of Montana decided that they had, in fact, successfully carried the burden of proof. The Louisiana Code (Article 1490) requires proof of the lack of reciprocity, rather than proof of the existence of reciprocity, which, under Louisiana law, is presumed until proved to the contrary.

From the testimony of Dr. Bulajic, the diplomatic notes passing between the State Departments of the United States and Yugoslavia, and the recent California and Montana decisions, the following conclusions are inescapable:

(1) That reciprocity, in law and in fact, existed as of the date of the death of testator and as of the present date—between the United States and Yugoslavia—by virtue of the Convention between the United States of America

and Serbia for Facilitating and Developing Commercial Relations of 1881.

(2) That the Treaty of 1881 (Article II) should be interpreted to include the nationals of both countries wherever they reside, i.e., in the United States or Yugoslavia and hence by the very Treaty in effect between the parties, reciprocity does in fact exist in favor of United States nationals residing in Yugoslavia as well as Yugoslav nationals residing in the United States.

(3) The binding interpretation of Article II of the 1881 Treaty issued by the People's Assembly of Yugoslavia (the Supreme Legislative Body of Yugoslavia) confirmed the interpretation that United States citizens are equal with Yugoslav citizens in regard to the manner and object of acquiring and disposing of property in Yugoslavia and further, that Yugoslav citizens may inherit real estate in Yugoslavia whether on the basis of law or by testament. Consequently, the People's Assembly of Yugoslavia has erased any doubt on the subject as to the right of a United States citizen to inherit property in Yugoslavia and dispose of it as he sees fit.

(4) That reciprocity exists in law is found in Article I of the Constitution of the Federal People's Republic of Yugoslavia (Ex. 13) which provides that the right of inheritance is regulated by law and that the inheritance of private property is guaranteed; further, the Law of Inheritance of Yugoslavia (Ex. 14) provides that rights belonging to individuals may be inherited and that inheritances are a matter of uniformity in Yugoslavia; likewise, the Law of Inheritance (Ex. 16) provides that foreign nationals have the same right to inherit in Yugoslavia as domestic citizens.

(5) Here we are not faced with conflicting evidence. The existence of treaties between Yugoslavia and America and their bilateral interpretation between the States

Departments of both countries, is clear and unequivocal. The interpretation of treaties by the respective governments is political, not judicial, and the Courts must accept them.

Accordingly, the application of plaintiff to nullify testator's last will and testament is dismissed on both counts and the intervenors are adjudged legally entitled to inherit under said last will and testament; plaintiff to pay all costs of these proceedings.

(Sgd.) L. H. YARRUT  
*Judge*

New Orleans, Louisiana,  
May 9th, 1960.

## APPENDIX I

No. 2 SERBIAN CONS. SERIES.

Consulate General of the  
United States for Serbia  
Athens March 29, 1883.

The Honourable

A. A. Adee.

Third Assistant Secretary of State.

Sir,

I have the honour to enclose herewith a report on the foreign trade of Serbia. With the difficulties of obtaining information from merchants who are jealous of allowing their business to be known by others, and with the almost total absence of complete or accurate statistics, the preparation of this report has been a matter of some difficulty, and it is necessarily very imperfect.

I shall send you shortly a copy of the Serbian tariff.

I am, Sir,

Very respectfully,

Your obedient servant,

Eugene Schuyler

Enclosure:

Report on Serbian foreign commerce.

## REPORT ON THE FOREIGN COMMERCE OF SERBIA.

*Area & Population.* Serbia before the Treaty of Berlin of 1878 had an area of 14,605 square miles, and a population of about 1,337,000. The new districts added by the Treaty of Berlin gave an increase of area of 4,195 square miles and about 303,000 population. The total area now is therefore 18,800 square miles, and the population at the end of 1881 was estimated at 1,760,000.

*Government.* The Government of the Kingdom being strictly constitutional, gives all the necessary guarantees

for the maintenance of good order and the execution of justice. There is a national legislative assembly, called the *Skuptschina*, composed of one chamber only, three fourths of the members being elected by the people, and the remaining fourth being appointed by the King. There are regular courts of justice, and the jurisprudence, both civil and criminal is based partly on Austrian and partly on French models. By commercial and consular treaties lately concluded, citizens of the United States have in Serbia all the rights and privileges enjoyed by subjects of other powers.

. . . . .

Eugene Schuyler

Consulate General of the  
United States for Serbia  
Athens, March 29, 1883.